91-1855

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois corporation,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of the State of Illinois, and NEIL F. HARTIGAN, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a State criminal law that singles out and restricts advertising by real estate professionals violate the First Amendment and the Equal Protection Clause?

II. Does a State criminal law that forbids solicitation of residents to list or sell their homes, but fails to define the communication it bans, violate the Due Process rights of real estate professionals when applied to communications that are not intended to persuade residents to list or sell their homes?

PARTIES

The parties to the proceeding in the Seventh Circuit Court of Appeals are:

1. Alvin D. Pearson, Plaintiff-Appellant in the court below.
2. Brenda Curtis, Plaintiff-Appellant in the court below.
3. Century 21 Pearson, Inc. Realtors®, an Illinois corporation, Plaintiff-Appellant in the court below.
4. James R. Thompson, as Governor of the State of Illinois, Defendant-Appellee in the court below. (Since the appeal was filed, James Edgar succeeded Mr. Thompson as Governor.)
5. Neil F. Hartigan, as Attorney General of the State of Illinois, Defendant-Appellee in the court below. (Since the appeal was filed, Roland W. Burris succeeded Mr. Hartigan as Attorney General.)

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Alvin D. Pearson, Brenda Curtis and Century 21 Pearson, Inc. Realtors®, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 13, 1992.

OPINIONS BELOW

This Petition seeks review following two appeals below.

The first opinion of the Court of Appeals for the Seventh Circuit is published, *Curtis v. Thompson*, 840 F.2d 1291,

and is reprinted in the Appendix hereto, p. 14 (hereinafter cited as "App., p. ____"). The first opinion of the United States District Court for the Northern District of Illinois is unpublished and is reprinted in the Appendix, p. 48.

The second opinion of the Court of Appeals is unpublished and is reprinted in the Appendix, p. 1. The second opinion of the District Court also is unpublished and is reprinted in the Appendix, p. 9.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1992. (App., p. 5.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fourteenth Amendment:

> §1. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

Illinois Revised Statutes, chapter 38, paragraph 70-51(d):

> "§1. Inducements to sell or purchase by reason of race, color, religion, national origin, ancestry, creed, handicap, or sex—Prohibition of Solicitation. It shall be unlawful for any person or corporation knowingly:
>
> * * *
>
> (d) To solicit any owner of residential property to sell or list such residential property at any time after

such person or corporation has notice that such owner does not desire to sell such residential property . . . ."

(Paragraph 70-51 is reprinted in its entirety in the Appendix, pp. 74-75.)

STATEMENT OF THE CASE

Petitioners And Their Advertising Activities

Petitioner Alvin D. Pearson ("Pearson") is a licensed real estate broker serving the south and southwest sides of the City of Chicago and its southern suburbs (R-80, ex. 1 at ¶2.)[1] Pearson is Past President of the Greater South Suburban Board of Realtors®. He has served on the Equal Opportunity Committee of that Board and of the National and Illinois Associations of Realtors® as well. Petitioner Century 21 Pearson, Inc. Realtors® ("Century 21 Pearson") is a real estate brokerage business owned and operated by Pearson. (*Id.*) Petitioner Brenda Curtis is employed by Century 21 Pearson as its Sales Manager. (*Id.*, Ex. 2 at ¶2.)

Like other real estate brokers,[2] Petitioners employ a variety of advertising and solicitation techniques to inform the public about themselves and their services. (*See, e.g.*, R-80, ex. 1 at ¶17, exs. 1c-1u, ex. 4 at ¶¶3-4, exs. 4b-4n.) Much of this communication does not seek to induce resi-

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[1] Petitioners cite the record below as "R-____." Record item R-80 is Petitioners' submission of affidavits and exhibits in preparation for a trial on an agreed record, which was never held. *See* infra, pp. 9-10.

[2] Petitioners use the term "brokers" to refer to all professionals engaged in the business of real estate brokerage, including licensed brokers and their employees, sales agents and independent contractors.

dents to list or sell their properties. For example, brokers promote their efforts to sell homes already listed with them. (*E.g.*, *Id.*, exs. 1e, 1i, 1j, 1t, 2b.) Brokers also advertise their mortgage brokerage, appraisal, investment, and commercial leasing and sales services. (*Id.*, ex. 1 at ¶17, ex. 4 at ¶4, exs. 4b, 4f, 4i, 4l.) Brokers also distribute flyers and the like asking residents if they have already decided to sell their homes (*e.g.*, *Id.*, ex. 2c; *see id.*, ex. 1 at ¶6), and encouraging those who have decided to sell to contact the broker. (*E.g.*, *Id.*, exs. 4c, 4g, 4m.) Finally, much of the advertising used by brokers is general goodwill advertising designed to foster name recognition and to promote all of their various services, not to induce anyone to sell or list his or her home. (*E.g.*, *Id.*, exs. 4b, 4h, 8b, 8c.)

The Illinois Anti-Solicitation Statute

Paragraph 70-51(d) of *Ill. Rev. Stat.* ch. 38 ("¶70-51(d)" or "the Statute") forbids and makes it a crime for any person or corporation:

> To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property.

The notice needed to trigger this prohibition may be given by individual homeowners. More commonly, however, community organizations or elected officials solicit homeowners to participate in organized notice drives. (R-80, ex. 1 at ¶16.) Service of notice lists compiled by such drives is discretionary; organizations or officials who compile the lists can choose to serve any broker for any reason.

Paragraph 70-51(d) contains no definition of solicitation, and the State's Attorney of Cook County ("the State's

Attorney," a former defendant in this case and the most frequent prosecutor of solicitation cases) maintains no guidelines defining the offense of real estate solicitation. Prosecutors have charged brokers who distributed goodwill advertising bearing Thanksgiving turkey recipes or weatherstripping tips. (R-80, ex. 8 at ¶¶5-7.) (Although a state judge dismissed these prosecutions, the State argues in its appellate brief that "the Statute truly does apply to" those advertisements. Brief of Defendants-Appellees, pp. 28, 34.)

Paragraph 70-51(d) bans communications at any place or time. (*Curtis v. Thompson*, App., p. 44 (Ripple, J., dissenting).) The Statute thus would subject to prosecution a real estate broker who placed flyers on the windshields of cars at a shopping mall or handed them to pedestrians as they passed her office. The Statute would preclude a real estate broker from discussing market conditions with neighbors at a baseball game.

Paragraph 70-51(d) carries a penalty of up to one year in prison and a fine of up to $1000 for a first offense. *Ill. Rev. Stat.* ch. 38, ¶¶70-52, 1005-8-3(a)(1), 1005-9-1(a)(2). A second offense increases the penalty to imprisonment for one to three years and a fine of up to $10,000. *Id.*, ¶¶70-52, 1005-8-1(a)(7), 1005-9-1(a)(1). The Statute requires the Illinois Department of Registration to *revoke* a defendant's Certificate of Registration as a real estate broker upon conviction for a single offense, hence depriving him of his ability to practice his profession and make a living. *Id.*, ¶70-53.

Paragraph 70-51(d) is an amendment to a statute that prohibits "inducements to sell or purchase by reason of race, color, national origin, ancestry, creed, handicap, or sex." *Id.*, ¶70-51(1), App., p. 74. The Illinois Supreme

Court has held that the purpose of ¶70-51(d) is to prevent "blockbusting" or "panic peddling." *People v. C. Betts Realtors*, 66 Ill. 2d 144, 361 N.E.2d 581, 583-84 (1977). The District Court reached the same conclusion below. (App., p. 10.) Neither ¶70-51(d) nor its legislative history mentions the word "privacy."

The Use of Anti-Solicitation Notices To Maintain Existing Racial Integration Patterns

Much of Petitioners' homeseeking clientele, like Petitioners, is black. (R-80, ex. 10 at ¶75; App., p. 66 at ¶69; *see* R-80, ex. 4 at ¶10 (black brokers generally tend to serve black homeseekers).) Some of Petitioners' customers hope to locate housing in predominantly white communities. Like other black-owned businesses trying to establish a presence in predominantly white communities, Petitioners rely heavily on direct advertising—such as mailings and flyers—to build a network of business contacts. (R-80, ex. 4 at ¶¶9-11.)

One of the predominantly white communities where Petitioners would like to practice their trade is the Beverly section of Chicago. The Beverly Area Planning Association ("BAPA") is a community organization that seeks to preserve the current racial composition of Beverly. (BAPA was a defendant below, and concluded its involvement by consent decree.) For example, BAPA encourages residents who plan to sell a home in Beverly to list the property with a "preferred" real estate broker, that is, a broker who agrees to assist BAPA's efforts to preserve the racial status quo. Such assistance may include refusing to cooperate with black brokers such as Petitioners (*Id.*, ex. 1 at ¶20) and withholding the property from local computerized multiple listing services (*Id.*, ex. 5 at ¶4), which

eliminates a color-blind means of locating housing in Beverly.

BAPA's effort to limit access to housing information in Beverly includes solicitation of residents to sign its anti-solicitation list. After collecting a list of those residents who agreed to participate in BAPA's campaign against "non-preferred" and outside real estate brokers, BAPA scrambled its list to complicate brokers' compliance. BAPA then served the scrambled list on Century 21 Pearson. (*Id.*, ex. 1 at ¶16.) Unable to justify the high cost of working with a scrambled list and afraid of the draconian penalty possible for even an inadvertent first offense (imprisonment and loss of professional license), Petitioners decided to refrain from contacting any Beverly resident.

Prosecution of Petitioners Pearson And Century 21 Pearson

Subsequently, Mardie Brown began working as an independent contractor for Century 21 Pearson. His first assignment was to telephone residents of the Damen neighborhood—which is adjacent to Beverly—to inquire whether they were planning to move in the next two years. Brown did not know where the Damen area meets Beverly, however, and inadvertently phoned several Beverly residents, some of whom had agreed to participate in BAPA's anti-solicitation effort. BAPA urged the State's Attorney to prosecute. The State's Attorney did not prosecute for sixteen months, but then, shortly after Pearson moved his office to a prominent location on the edge of Beverly, the State's Attorney charged Brown, Pearson and Century 21 Pearson with "knowingly" violating ¶70-51(d). (Petitioner Brenda Curtis was not charged.) (App., pp. 61-66.)

Proceedings Below

Petitioners then filed their Verified Complaint, seeking a declaration that ¶70-51(d) violates their First Amendment, due process and equal protection rights. The District Court initially dismissed, but then reinstated and stayed, the actions of Petitioners Pearson and Century 21 Pearson because of the pendency of state prosecutions. (App., pp. 48-49.) As to Petitioner Curtis, the court denied a motion by Defendant to dismiss her action for failure to state a claim. (*Id.*, p. 49.) Although the District Court held no evidentiary hearing and made no findings of fact, it also denied Curtis' motion for a preliminary injunction against the Statute's enforcement "because she cannot demonstrate a likelihood of success on the merits." (*Id.*) Curtis appealed.

A divided Court of Appeals affirmed. (App., p. 14, 840 F.2d 1291 ("the *Curtis* decision").) Judge Coffey's opinion held that the District Court properly denied Curtis' motion without an evidentiary hearing because her Complaint created "less than a negligible chance of success on the merits." Judge Coffey acknowledged "Curtis raises an interesting question . . . whether the regulation does advance the government's interest in a meaningful way to prevent blockbusting . . . ." (App., p. 27.) Judge Coffey ruled, however, that ¶70-51(d) directly and narrowly advances another interest "the state of Illinois argues is served by the statute: the interest in insuring the privacy of the homeowner." (*Id.*) Judge Coffey relied heavily on *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). There the Court upheld a federal statute that provides a procedure by which any household may bar unsolicited mailings "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." (App., p. 30.)

Judge Eschbach concurred "in the result" but rejected the principal basis of Judge Coffey's opinion: his reliance on *Rowan v. Post Office Dept.* (*Id.*, p. 40.) Judge Eschbach distinguished *Rowan* on the ground that the federal statute was content-neutral, while "the Illinois statute at issue in the present case cannot be construed as content neutral because it clearly proscribes one type of communication (real estate solicitations) and mandates criminal penalties for violation of that proscription." (*Id.*) Judge Ripple dissented, agreeing with Judge Eschbach that *Rowan* did not control the outcome. (*Id.*, p. 45.) Judge Ripple also noted that the restriction on solicitation by real estate brokers alone is "a rather feeble approach" to the protection of residential privacy and that ¶70-51(d) "prevents—apparently—all real estate solicitation at any place (not just the home) at any time by anyone." (*Id.*, p. 44.)

The case then returned to the District Court for a decision on the merits. BAPA entered into a consent decree by which it agreed not to scramble its anti-solicitation list and to refrain from referring inadvertent first-time violations to the State's Attorney. The State's Attorney entered into a stipulation of dismissal under which he agreed to be bound by the ultimate judgment in the case. Petitioners Pearson and Century 21 Pearson resumed their participation in the case following the discharge of the criminal complaint against them.

The District Court initially rejected the State's assertion that the Court of Appeals' *Curtis* decision required dismissal of Petitioners' Verified Complaint, and ordered the parties to submit the case for a decision on the merits. Petitioners and the State agreed to submit the case upon a record consisting of affidavit testimony and supporting

exhibits. Petitioners' evidence consisted of affidavit testimony from seven witnesses, including five experts, and dozens of exhibits. (R-80.) The State submitted the affidavit of one expert. (The parties' evidence is summarized *infra* at pp. 18-19.) None of this evidence was before either the District Court or the Court of Appeals at the time of the preliminary injunction rulings.

The District Court scheduled an evidentiary hearing on the merits, but then entered judgment dismissing Petitioners' Complaint before holding the hearing, on the ground that the *Curtis* decision precluded its consideration of the Petitioners' evidence. (App., p. 12.) On Petitioners' motion following entry of its judgment, the District Court deemed Petitioners' Verified Complaint to be amended to conform to the evidence, but refused to vacate its judgment. (App., p. 7.) Petitioners' amended complaint is reprinted in the Appendix at pp. 50-73. The Court of Appeals affirmed, holding that its decision on Curtis' preliminary injunction motion established the law of the case and therefore Petitioners' "complaint was insufficient as a matter of law (regardless of the facts) . . . ." (App., p. 4.)

REASONS FOR GRANTING THE WRIT

Refusing to pause to consider the facts establishing Petitioners' claim, the courts below summarily upheld ¶70-51(d) on grounds so broad and so illusory that their decision effectively strips commercial speakers of any protection against viewpoint discrimination under the First Amendment and the Equal Protection Clause. The lower courts' decision also deprives Petitioners of any statutory warning as to which communications may subject them to serious criminal punishment. Petitioners respectively suggest a decision of such gravity deserves fuller consideration than their claim received below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SIXTH CIRCUIT AND THIS COURT BECAUSE IT UPHOLDS A LAW THAT DISCRIMINATES AMONG SPEAKERS BASED ON THEIR VIEWPOINTS AND GRANTS STANDARDLESS DISCRETION TO LOCAL OFFICIALS.

Paragraph 70-51(d) discriminates on the basis of viewpoint. The law silences only real estate brokers; all other commercial and non-commercial speakers remain free to solicit residents in Illinois. The law does not even extend to the general topic of real estate; for example, building contractors may urge residents to remodel or redecorate instead of moving. The State offered no evidence that real estate advertising intrudes on residential privacy to a greater degree than any other viewpoint. (*Curtis v. Thompson*, App., p. 36 (Ripple, J., dissenting).) Instead, it is apparent that the State singled out real estate advertising because it may enable blacks to find housing in predominantly white neighborhoods. (Other subsections of ¶70-51, however, directly prohibit steering, panic peddling and blockbusting activities, App. at 74, as does federal law, 42 U.S.C. §3604(e).)

In *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, No. 91-1200 (March 9, 1992), the Sixth Circuit Court of Appeals held unconstitutional a city regulation banning—for aesthetic reasons—sidewalk newsboxes offering commercial advertising, including a magazine listing residential properties for sale. The court observed that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the potentially false or misleading content of the speech itself, or with distinctive adverse effects that the speech will produce. *Id.* at 469-70. Because the City regulation did not seek to ban speech that is inherently misleading, or to alleviate adverse effects allegedly caused by and flowing directly from the type of speech regulated, the court ruled that the regulation did not "reasonably fit" the City's interest in aesthetics. *Id.* at 470.

The decision below conflicts directly with *Discovery Network* in one respect, but differs in another, equally important respect. The regulation at issue in each case draws a distinction among speakers that is at best distantly related to the broad governmental interest it purportedly seeks to advance. No quality inherent in "commercial speech" makes it more offensive to aesthetic interests than non-commercial speech; the same is true of the relationship between real estate advertising and residential privacy. Hence the opposite outcomes in these cases are irreconcilable. The cases differ, however, in that the Cincinnati regulation affects a broad category of speech—that proposing a commercial transaction—while the Illinois criminal statute singles out a discrete group of speakers whose message is disfavored on racial grounds, because it may assist black homeseekers to find housing in predominantly white communities.

If this Court affirms the *Discovery Network* decision, it should reverse the decision below *a fortiori*. Viewpoint discrimination is significantly more offensive to First Amendment values than is a distinction between commercial and non-commercial speech, and hence less defensible on broad, unrelated grounds such as privacy. *E.g.*, *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring) (even though "commercial speech" is involved, suppression of information to dampen demand for a legally offered product "strikes at the heart of the First Amendment"). But if this Court should reverse *Discovery Network* based on the pragmatic distinctions between commercial and non-commercial speech, it should use this case as a vehicle to reaffirm the First Amendment's disfavor of regulations that silence a single group because of popular hostility to its viewpoint, even in the context of commercial speech.

The decision below also conflicts irreconcilably with this Court's due process jurisprudence. Paragraph 70-51(d) forbids real estate professionals "to solicit any owner of residential property to sell or list such residential property . . . ," but contains no definition of the term "solicit." *Cf. South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 895 (7th Cir. 1991), *cert. denied*, No. 91-925 (Jan. 27, 1992) (upholding anti-solicitation ordinances containing eight-part definition of "solicitation"); *Penny Saver Publications v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990) (holding unconstitutionally vague an anti-solicitation ordinance containing definition that failed to inform real estate brokers whether it prohibited advertisements in media of general circulation). Uncontroverted evidence presented by Petitioners, but not considered below (*see infra*, pp.

18-19), establishes that state prosecutors maintain no guidelines defining solicitation, and frequently prosecute general goodwill and other advertising that does not attempt to induce anyone to sell or list property. (R-80, ex. 8.) Brokers, the attorneys who advise them, and prosecutors all grope in the dark for the Statute's meaning, influenced as much by political pressure from community organizations as by the intent of the Illinois General Assembly. (*Id.*)

The failure to define "solicit" thus vests broad, standardless discretion in local officials. It also forces brokers to guess whether a particular flyer and the political climate surrounding its use will trigger a prosecution. The decision below upholding this law conflicts with this Court's rulings in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 & n.5 (1972), and *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech").

Attempting to "remedy" this defect, the Court of Appeals ruled that brokers must refrain from *all* communication with residents, whatever its purpose:

> In this case appellant knows precisely what she must refrain from doing upon receipt of statutory notice. The complainants' (sic) names must be removed from any mailing list the broker may have, and the broker must refrain from future communications to the named addressee.

(App., p. 37 n.12.) A broker or his attorney who sought guidance from *Black's Law Dictionary*, however, would learn that "solicit" means:

> To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose

> of receiving; . . . The term implies a personal petition and importunity addressed to a particular individual to do some particular thing.

Id. at 1248-49 (5th Ed. 1979). Paragraph 70-51(d) says the particular thing one may not entreat residents to do is to list or sell their homes. The Statute's terms thus offer no warning that one must refrain from *all* future communications with residents even if the purpose is simply to advise residents of one's existence and invite inquiry about any of one's services, which include many things other than listing homes. By *broadening* the Statute's scope in order to cure its vagueness, the decision below conflicts directly with *Pierce v. United States*, 314 U.S. 306, 311 (1941) ("judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness").

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW BECAUSE IT PERMITS THE READY CIRCUMVENTION OF THE *CENTRAL HUDSON/FOX* TEST.

The Court's decisions in *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), and *Board of Trustees v. Fox*, 492 U.S. 469 (1989), establish the requirements for a valid restriction on commercial speech. To qualify for First Amendment protection, the speech must concern lawful activity and not be misleading. If the speech qualifies, the government must prove that its asserted interest is substantial, that the regulation directly advances the interest asserted, and that the regulation employs a means narrowly tailored to achieve the government's interest. 447 U.S. at 566; *see* 492 U.S. at 480.

The decision below accepts formalistic responses to the second, third and fourth prongs of this test, effectively draining them of all substance. By doing so, it opens the way to a limitless range of content- and viewpoint-based restrictions on commercial speech.

The record contains no hint that a concern for residential privacy entered the mind of even a single legislator who voted to enact Paragraph 70-51(d). The General Assembly passed the law solely to prohibit blockbusting and panic peddling, and predominantly white communities that fear white flight have used it to discourage blacks from moving in by prohibiting otherwise lawful speech. *See South Suburban Housing Center*, 935 F.2d at 876 (purpose of municipal anti-solicitation laws modeled after ¶70-51(d) was to keep residents from questioning the racial stability of their communities or re-evaluating their decision to live there and to reduce the ability of homeseekers to find homes in the municipalities). Nevertheless, the Court of Appeals unquestioningly accepted the argument of the State's lawyer that privacy concerns underlie Paragraph 70-51(d). (App., p. 27.)

Like an asserted interest in aesthetics, privacy is a facially reasonable justification for denying a speaker access to a forum that may conceal viewpoint-based discrimination. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (courts must carefully scrutinize asserted aesthetic judgments "to determine if they are only a public rationalization of an impermissible purpose"). To a government seeking to restrict speech, privacy has the additional advantage of near universal utility. Virtually any restriction on speech incrementally advances a privacy interest by reducing the total volume of speech reaching listeners; this fact enabled

the court below to dismiss Petitioners' objection to being singled out as "mere underinclusiveness." (App. at 34.)

If the *Central Hudson/Fox* test does not require meaningful scrutiny when government asserts broad-gauged justifications such as privacy and aesthetics, then the First Amendment effectively offers no protection against viewpoint-based restrictions on commercial speech. Government can pursue any number of "public policies" under the guise of "privacy," driving out any business that piques local prejudice or disfavor. Indeed, if "privacy" justifies a law designed to discourage blacks from moving to white communities, then it could be used as readily to silence Korean grocers or South Asian convenience store owners.

The decision below also eviscerates the "reasonable fit" element of the *Central Hudson/Fox* test. Judge Coffey's opinion in *Curtis* holds that ¶70-51(d) satisfies this requirement because it allows residents to choose whether to bar real estate solicitations, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). (Although Judges Eschbach and Ripple both felt *Rowan* must be distinguished because the statute at issue there was content-neutral, the Court of Appeals subsequently declared Judge Coffey's view the law of the case. App., p. 4.) The purported "fit" between ¶70-51(d) and the State's asserted interest in privacy is illusory, however, because the law allows residents to insulate themselves from only one viewpoint that is selected by the State, rather than from any topic that might offend their privacy. *Contra Rowan*, 397 U.S. at 738 ("In operative effect the power of the householder is unlimited . . . . Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting power to make any discretionary evaluation of the material in a governmental official"). If the illusory fit between ¶70-51(d) and

privacy concerns is reasonable, then government can shield from judicial review any form of viewpoint discrimination simply by requiring residents to opt into the government's discriminatory scheme.

III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REDRESS THE LOWER COURTS' REFUSAL TO CONSIDER THE FACTS OF PETITIONERS' CASE.

The courts below denied Brenda Curtis' motion for a preliminary injunction on the ground that, as a matter of law, her original complaint had less than a negligible chance of succeeding on its merits. (App., pp. 14, 49.) (Incongruously, the District Court simultaneously *denied* the defendants' motion to dismiss Curtis' action for failure to state a claim. App., p. 48.) Consequently, Curtis received no opportunity to have either court below consider the facts establishing the merits of her claim.

When the case returned to the District Court for a decision on the merits, the parties submitted the case on an agreed record consisting of affidavits and exhibits. The evidence introduced by Petitioners establishes numerous facts at odds with those assumed by Judge Coffey in his *Curtis* decision: (1) Petitioners and other real estate brokers use many advertising materials and techniques which do not urge residents to sell or list their homes; (2) prosecutors frequently charge brokers with violations of ¶70-51(d) for using such advertising; (3) brokers and their attorneys cannot predict with confidence whether any given piece of material or technique will trigger a prosecution; (4) the principal use of ¶70-51(d) is to discourage blacks from moving to predominantly white communities, not to advance privacy concerns; and (5) enforcement of ¶70-51(d) effectively precludes brokers from

communicating with residents who do *not* sign anti-solicitation notices. The State's evidence controverted none of these facts; it sought instead to justify ¶70-51(d) solely as an anti-blockbusting measure.

The courts below refused to consider the facts submitted by Petitioners and no findings of fact of any kind were made or reviewed. Both courts held that Judge Coffey's *Curtis* opinion was the law of the case. *Contra University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (findings of fact *and conclusions of law* rendered in a preliminary injunction proceeding are not binding at a trial on the merits). Because these facts raise issues not addressed in the *Curtis* opinion, the lower courts' refusal to consider them denied Petitioners a fair hearing of their claim.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals should be granted.

Respectfully submitted,

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91-1855

(2)

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois corporation,

Petitioners,

v.

JAMES R. THOMPSON, as Governor of the State of Illinois, and NEIL F. HARTIGAN, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois corporation,

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v.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

[UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued October 16, 1991

February 13, 1992

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

ALVIN D. PEARSON, BRENDA CURTIS and
CENTURY 21 PEARSON, INCORPORATED REALTORS,

Plaintiffs-Appellants,

No. 89-3248 v.

JAMES R. THOMPSON and NEIL F. HARTIGAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 2181—Brian Barnett Duff, Judge

ORDER

The appellants appeal the judgment of the district court, dismissing the plaintiffs' complaint seeking to enjoin the

enforcement of Ill. Rev. Stat. ch. 38 70-51(d)[1] and a declaration that the statute is unconstitutional on the ground that the law of the case, *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988), held that their complaint was insufficient as a matter of law. We affirm.

I. FACTS

The posture of this case on the previous appeal involved a challenge to the district court's denial of plaintiff Curtis' request for a preliminary injunction against the enforcement of the anti-solicitation statute.[2] Subsequent to our affirmance of the District Court's denial of the motion for a preliminary injunction, on the ground that the complaint was insufficient as a matter of law, *see Curtis*, 840 F.2d at 1297, the trial court dismissed the complaint. The facts relevant to this appeal are set forth in detail in *Curtis*, 840 F.2d at 1293-95.

In this appeal the plaintiffs again attempt to challenge the same issues we have previously addressed in *Curtis*: whether the statute violates the First Amendment, whether it is unconstitutionally vague, and whether the statute offends the equal protection clause. We recently reaffirmed our *Curtis* holding, which rejected the appellants' arguments on those issues, in *South Suburban Housing Center*

---

[1] Ill. Rev. Stat. ch. 38 ¶ 70-51 states in pertinent part: "It shall be unlawful for any person or corporation knowingly: (d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property."

[2] The actions of the other plaintiffs were stayed pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), pending resolution of state court prosecutions for violating the statute. The stay was lifted following the disposition of the criminal charges, and all of the plaintiffs are now before us in this appeal.

v. Greater South Suburban Board of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, 1992 U.S. LEXIS 637 (Jan. 27, 1992).

The only issue we address in this appeal is whether our former opinion in *Curtis v. Thompson* became the law of the case.

II. DISCUSSION

In *Curtis* we held that the complaint failed. *See Curtis*, 840 F.2d at 1297. We ruled that while the plaintiffs' solicitation of the owners of residential property to sell or list such property was protected speech, the state's interest in protecting the privacy of individual homeowners outweighed the realtors' free speech interest: "In our view, that interest [privacy] is more than sufficient to justify the limited curtailment of [the plaintiffs'] right to speak to citizens in their homes." *Curtis*, 840 F.2d at 1299. Moreover, we held that further fact finding at the trial court level would was unnecessary for the disposition of the claim, for the issue of the sufficiency of the complaint was "solely a question of law." *Id.* at 1296. We also rejected Curtis' claims that the statute was unconstitutionally vague or that it violated her equal protection. *See id.* at 1304 n.12.

The appellants quote *Wright and Miller* for the proposition that "[r]ulings that simply deny extraordinary relief for want of a clear and strong showing on the merits . . . do not trigger law of the case consequences." Our opinion in *Curtis*, however, did more than "simply deny extraordinary relief for want of a clear and strong showing on the merits"—we held that the plaintiffs were without even "a 'negligible' chance of success" because the complaint was insufficient as a matter of law. *See Curtis*, 840 F.2d

at 1296. Hence, the rule in regard to the non-precedential effect of holdings denying "extraordinary relief for want of a clear and strong showing on the merits" is inapplicable in this case. The arguments the realtors raise in this appeal were addressed and rejected in *Curtis*.

> "This court has long held that 'matters decided on appeal become the law of the case to be followed in all subsequent proceedings in the trial court and, on second appeal, in the appellate court, unless there is plain error of law in the original decision.' *Kaku Nagano v. Brownell*, 212 F.2d 262, 263 (7th Cir. 1954). The law of the case doctrine 'is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter.' "

Evans v. City of Chicago, 873 F.2d 1007, 1013-14 (7th Cir. 1989) (citation omitted). When the issues have previously been decided, the law of the case should apply unless there are exceptional circumstances militating against it:

> "These include (1) substantial new evidence introduced after the first review, (2) a decision of the Supreme Court after the first review that is inconsistent with the decision on that review, and (3) a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous."

Chicago & N.W. Transportation Co. v. United States, 574 F.2d 926, 930 (7th Cir. 1978). Since we ruled in *Curtis* that the plaintiffs' complaint was insufficient as a matter of law (regardless of the facts), there has been no intervening decision of the Supreme Court that is inconsistent with *Curtis* (in fact, the Supreme Court denied certiorari in *South Suburban Housing Center*, 1992 U.S. LEXIS 637), and the appellants have failed to convince us that our earlier decision was in error, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 13, 1992

BEFORE: Honorable JOHN L. COFFEY, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 89-3248

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INCORPORATED REALTORS, an Illinois corporation,

Plaintiffs-Appellants

v.

JAMES R. THOMPSON and NEIL F. HARTIGAN,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 2181—Judge Brian Barnett Duff

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the decision of this Court entered this date.

(1061-010392)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 2181 Date: September 14, 1989

Name of Assigned Judge: Brian Barnett Duff

Case Title: Pearson v. Thompson

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☑ [Other docket entry:]

The plaintiffs' motion to vacate is DENIED.

* * * * *

(12) ☑ (For further detail see ☑ order on the reverse of the original minute order form.)

* * * * *

(Reverse Side of Order of September 14, 1989)

On July 25, 1989, this court dismissed the plaintiffs' complaint on the grounds that the Seventh Circuit's affirmance of this court's earlier denial of the plaintiffs' motion for a preliminary injunction established that the complaint failed to state a claim. *See Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). In doing so, this court noted that although the plaintiffs had submitted additional evidence, they had not amended their complaint, and that without an amended complaint there simply were no viable claims for the court to resolve. The plaintiffs now have moved this court to vacate that order, and to grant them leave to file an amended complaint conforming to the evidence they previously filed in support of their original pleading.

Because the Seventh Circuit's ruling came at a preliminary stage in the litigation, this court agrees with the plaintiffs that they are entitled to an opportunity to amend their complaint. The plaintiffs, however, have provided no explanation as to how their new pleadings alter the constitutional calculus set forth by the Seventh Circuit in its ruling. Instead, the plaintiffs' primarily argue that this court is not bound by that calculus, for two reasons: (1) because Judge Coffey's opinion, though ostensibly for the Court, really set forth only his personal views, and was rejected by the other two members of the panel; and (2) because, in any case, the Court's opinion was wrong.

The plaintiffs' first argument is incorrect. Although Judge Eschbach's statement in his concurrence that he agreed with "the result reached by the court," *id.* at 1305, arguably supports the plaintiffs' position that he was concurring in the result alone, his later disavowal "of the final four pages of the *majority* opinion pertaining to the subjects of judicial restraint and the proper role of the federal judiciary," *id.* (emphasis added), demonstrates that he joined the remainder of Judge Coffey's opinion: Since Judge Ripple dissented, Judge Coffey's opinion could have been a majority opinion only if Judge Eschbach joined it. Thus, the Court's ruling extends beyond the narrow judgment to Judge Coffey's opinion (with the exception of those portions Judge Eschbach disavowed).

The plaintiffs' second argument—that this court should not follow the *Curtis* Court's ruling because the opinion misreads First Amendment jurisprudence—obviously has no place here. While the Seventh Circuit may decide that the *Curtis* Court painted with too broad a brush in ruling that, under any set of facts, the Illinois statute (on

its face and as applied) constitutionally limits commercial speech, this court lacks the authority to make such a determination.

This is not to say, however, that the plaintiffs could not have amended their complaint to state a viable claim notwithstanding the Seventh Circuit's ruling. The plaintiffs continue to predicate all of their claims on First Amendment rights—even their equal protection claim focuses on discrimination against "the fundamental right of freedom of speech," Am. Compl. par. 97—and it was precisely these rights which the Seventh Circuit held was overridden by homeowners' rights of privacy. Yet, laced throughout the plaintiffs' amended complaint are allegations suggesting that the intent and effect of the statute are to discriminate against blacks—black realtors as well as black residents. If so, then the plaintiffs may have equal protection claims based on this discrimination, claims which the Seventh Circuit's opinion neither addresses nor forecloses. Because the plaintiffs have not brought such claims, however, they are not before this court.

/s/ BRIAN BARNETT DUFF

[Dated July 25, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALVIN D. PEARSON; MARDIE BROWN; BRENDA CURTIS; and CENTURY 21 PEARSON, INC. REALTORS, an Illinois corporation,

Plaintiffs,

v. No. 86 C 2181

JAMES R. THOMPSON; and NEIL F. HARTIGAN,

Defendants.

MEMORANDUM OPINION

Plaintiffs Alvin Pearson, Brenda Curtis, Harold Baker and Mardie Brown bring this action against James R. Thompson, the governor of Illinois, and other Illinois officials. They seek to invalidate Ill.Rev.Stat. ch. 38, ¶ 70-51(d) ("¶ 70-51(d)"), on the grounds that it infringes on their First, Fifth, and Fourteenth Amendment rights. On October 24, 1986, this court denied their motion for a preliminary injunction, ruling that their complaint failed to present even a negligible chance of success. The defendants appealed, and more than a year later, a divided panel of the Seventh Circuit affirmed. *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). At the request of the parties, this court then accepted trial briefs, and scheduled a bench trial for final adjudication of the plaintiffs' claims. After reviewing the briefs in light of the Seventh Circuit's ruling, however, this court concludes that further proceedings are not necessary, and that the complaint must be dismissed.

I

Paragraph 70-51(d) provides, in relevant part, that "[i]t shall be unlawful for any person or corporation knowingly . . . (d) to solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property." The statute is designed to prevent block-busting and panic-peddling, a practice by which real estate brokers use the fear of racial integration (and, presumably, neighborhood deterioration) to motivate people to sell their homes. *See People v. C. Betts Realtors, Inc.*, 66 Ill.2d 144 (1977).

The plaintiffs are real estate brokers who believe that the statute infringes on their free speech, due process, and equal protection rights by preventing them from engaging in their profession. They seek to have the statute declared unconstitutional, and to have the defendants enjoined from enforcing it against them.

In denying the plaintiffs' motion for a preliminary injunction, this court ruled that the plaintiffs had no chance of prevailing on the merits, and accordingly that there was no need to consider the other factors usually applicable at the preliminary injunction stage—i.e., the adequacy of legal remedies, the possibility of irreparable harm, the balance of harms, and the public interest. The Seventh Circuit agreed. It held that the plaintiffs could not state a claim for relief under the First Amendment because, though not its intended function ¶ 70-51(d) lawfully protects the privacy interests of homeowners who do not wish to receive real estate solicitations in their homes. 840 F.2d at 1299. In a footnote, the Court also disposed of the plaintiffs' due process and equal protection claims. It held that ¶ 70-51(d) does not violate due process on vagueness grounds because it sufficiently apprises the

plaintiffs of what conduct it prohibits. It further held that the statute does not violate equal protection because it is rationally related to the State's legitimate interest in protecting homeowner privacy. *Id.* at 1304 n.12. The Court then emphatically rejected the insistence of the dissent (*id.* at 1308 (Ripple, J., dissenting)) that the Court reverse and remand for this court to weigh the other preliminary injunction factors:

> Returning the case to the district court for further development of the record is not only unnecessary, but it may very well give the wrong signal to the trial court to substitute its judgment for that of the duly elected representatives of the citizens of Illinois, the Illinois legislature.

Id. at 1303 n.11.

II

In light of this ruling, one would have expected the defendants immediately to move for dismissal or summary judgment. For reasons beyond this court's ken, the defendants did not do so. Instead, they generously consented to a partial judgment against them in which they agreed not to prosecute the plaintiffs for random and inadvertent violations of ¶ 70-51(d). They then acquiesced in the plaintiffs' request that the parties submit trial briefs so that the plaintiffs could present additional facts bearing on the constitutionality of the statute.

The parties were free to consent to any judgment they wished. They may not, however, compel this court to participate in useless litigation. Though the trial briefs contain a number of factual disputes, they present not a single issue of material fact. Nor could they.

The plaintiffs' rationale for requesting further proceedings lies in the indisputable rule that findings of fact, and conclusions of law predicated on those factual findings, made at preliminary injunction hearings are not binding in subsequent proceedings. Yet, that rule has no place here. This court made no factual findings in denying the plaintiffs preliminary relief, and the Seventh Circuit did not rely on any such findings in affirming that ruling. Instead, this court and the Seventh Circuit rejected the preliminary injunction motion because the complaint was "insufficient as a matter of law." 840 F.2d at 1297. However valid the plaintiffs' facts, the plaintiffs could prevail in further proceedings only if this court ignored the Seventh Circuit's legal rulings, which it may not do, or if the plaintiffs amended their complaint, which they have not done. The defendants are entitled to dismissal of the complaint.

CONCLUSION

The complaint is dismissed.

ENTER:

/s/ BRIAN BARNETT DUFF
BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: July 25, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Alvin D. Pearson

v. CASE NUMBER: 86 C 2181

James R. Thompson

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment by dismissal is entered in favor of the defendants and against the plaintiffs. Enter judgment.

July 25, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ BARBARA J. BROTHERSON
(By) Deputy Clerk

[840 F.2d 1291 (7th Cir. 1988)]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86-2921

BRENDA CURTIS,

Plaintiff-Appellant,

v.

JAMES R. THOMPSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 2181—**Brian Barnett Duff**, *Judge.*

ARGUED MAY 21, 1987—DECIDED FEBRUARY 5, 1988

Before COFFEY and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Plaintiff Brenda Curtis appeals the district court's denial of her motion for a preliminary injunction. Her complaint seeks to enjoin the enforcement of an Illinois statute making it a crime to solicit the sale of residential real estate once the owner has given notice that he or she does not desire to sell the property, Ill. Rev. Stat. Ch. 38 §70-51(d), as violative of the First Amendment. We affirm.

I.

The Illinois General Assembly enacted a statute in 1973 prohibiting any individual or corporation from contacting residential property owners for the purpose of persuading them to sell or list their homes after the property owner has given notice to the solicitor that he or she is not interested in selling the property. Ill. Rev. Stat. Ch. 38 § 70-51(d).[1] Subsection (d)(1) of the statute enables the property owner to provide the required notice either personally or through a third party. Individual property owners may also give notice to particular real estate brokers or,

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[1] Ill. Rev. Stat. Ch. 38 § 70-51(d) provides:

"It shall be unlawful for any person or corporation knowingly:

(d) to solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property. For the purpose of this subsection, notice must be provided as follows:

(1) The notice may be given by the owner personally or by a third party in the owner's name, either in the form of an individual notice or a list, provided it complies with this subsection.

(2) Such notice shall be explicit as to whether each owner on the notice seeks to avoid both solicitation for listing and sale, or only for listing, or only for sale, as well as the period of time for which any avoidance is desired. The notice shall be dated and either of the following shall apply:

(A) Each owner shall have signed the notice; or

(B) The person or entity preparing the notice shall provide an accompanying affidavit to the effect that all the names on the notice are, in fact, genuine as to the identity of the persons listed and that such persons have requested not to be solicited as indicated.

(3) The individual notice, or notice in the form of a list with the accompanying affidavit, shall be served personally or by certified or registered mail, return receipt requested."

It is a defense to a criminal charge that actual notice was not given to the alleged solicitor.

as in this case, in the form of a list containing the names of several property owners. *Id.*

The stated purpose of the statute is to prevent so-called "blockbusting" or "panic peddling," *see People v. C. Betts Realtors, Inc.*, 66 Ill.2d 144, 361 N.E.2d 581, 583-84 (1977) (upholding the constitutionality of § 70-51(d)); that is, the unlawful practice of "solicit[ing] sales of property from white persons on the ground that loss of value will ensue because Negroes have moved . . . into a neighborhood . . . ." *Chicago Real Estate Board v. City of Chicago*, 224 N.E.2d 793, 797 (1967).[2] The Act's title illustrates this purpose: "An Act to Prohibit the Solicitation or Inducement of Sale or Purchase of Real Estate on the Basis of Race, Color, Religion, National Origin, Ancestry, Creed, Handicap, or Sex." Ill. Rev. Stat. Ch. 38 § 70-51. Violations of the statute carry a penalty including either a fine and/or imprisonment, or a combination of both.[3]

Plaintiff-appellant Brenda Curtis, a registered real estate agent, filed this civil rights action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the Act. Other plaintiffs in this lawsuit (not parties to this appeal) are Alvin T. Pearson, Harold T. Baker, and Mardie Brown,

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[2] "Blockbusting" is defined by the *American Heritage Dictionary* as:

> "the practice of persuading white homeowners to sell quickly and usually at a loss by appealing to the fear that minority groups and especially blacks will move into the neighborhood, with a resulting decline in property values."

American Heritage Dictionary, 2nd College Edition, at page 189.

[3] The penalty for a first offense under the statute is imprisonment for up to one year, a fine of up to $1,000, or a combination of both. Ill. Rev. Stat. Ch. 38, §§ 70-52, 1005-8-3(a)(1), 1005-8-1(a)(2). The penalty for a second offense after a conviction is imprisonment for one to three years, a fine of up to $10,000, or a combination of both. *Id.*, §§ 70-52, 1005-8-1(a)(7), 1005-9-1(a)(7). Upon conviction for a single offense, the Department of Registration is also directed to revoke the defendant's certificate of registration as a real estate broker. Ill. Rev. Stat. Ch. 38, § 70-53.

owners and operators of Century 21 Pearson, Inc. Realtors. The defendants are James R. Thompson, the governor of the state of Illinois, Neil F. Hartigan, the Illinois Attorney General, Richard M. Daley, State's Attorney of Cook County, and the Beverly Area Planning Association (BAPA), an Illinios not-for-profit corporation located in Beverly, Illinois.

This lawsuit arose out of BAPA's compilation of a list of some 3,500 Beverly, Illinois, residents who requested that this community organization (BAPA) notify all real estate agents doing business in the township that they did not wish their homes listed for sale with any real estate agencies. These residents, through this affirmative, formal notification to BAPA, were anticipating that the listing of their names on this exempt list would free them from phone calls and/or solicitation by real estate agents. On March 12, 1984, a copy of the BAPA real estate exclusion list was delivered to the plaintiff Alvin Pearson at his Century 21 real estate agency. The plaintiff-appellant Brenda Curtis, an independent real estate agent, did not receive a copy of this list.

According to the complaint on file, BAPA received complaints from a number of Beverly residents who had been solicited by Century 21 after having signified that they did not wish to be called and solicited about listing their residential property for sale. Thereafter, BAPA suggested to the state's attorney's office that it investigate these complaints and any possible statutory violations by Century 21 employees. An investigation followed and revealed that certain "independent contractors working for Century 21" made telephone calls to several Beverly residents whose names appeared on the BAPA list, inquiring if they were interested in listing their homes for sale.[4] Subse-

[4] Plaintiff's complaint alleges that on June 25, 1984, Brown signed an "Independent Contractor Agreement" with Century 21 and on that date began working from the Century 21 office. Pearson gave Brown a copy of a "reverse directory" of addresses on South Win-

(Footnote continued on following page)

quently, plaintiffs Pearson, Baker, Brown and the Century 21 agency were charged with criminal violations of the statute.

In her complaint, Curtis alleges that she is a registered real estate broker and would have provided truthful and accurate information to Beverly residents regarding the listing of homes for sale in the area were it not for the existence of the statute and its subsequent enforcement against the other plaintiffs. She submits that because of the state's enforcement of the statute, she has been deprived of the right to offer her services to Beverly residents, including those whose names are *not* listed on the BAPA registry. She maintains that this statute violates her right to free speech under the First Amendment and asks that the state and its agents be enjoined from enforcing it.

On the same day the plaintiffs filed their complaint, March 31, 1986, all the plaintiffs moved for a temporary

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[4] *continued*

chester Street in Chicago. (A reverse directory contains the same information as a telephone directory but lists residents' names and telephone numbers in the numerical order of their addresses.) He then instructed Brown to ask the individuals whether they were considering moving in the next two years. If they answered yes, he was to note their name and number for a later communication. If they answered no, he was to ask them if they knew anyone else who might be interested in selling or buying a home. According to the complaint, Pearson did not advise Brown of the existence of the BAPA list, of which Pearson was aware, because Pearson had directed Brown to make telephone calls only to individuals in the Damen area and not to make calls to anyone in Beverly. However, because Brown was unfamiliar with the neighborhood, he did not know that the Damen area ends at 90th Street and the Beverly area begins at 91st Street. Complaint at ¶ 40-45. He therefore placed a number of phone calls to persons on the BAPA list. Those individuals "expressed displeasure at Brown's having called them." *Id.* at ¶ 46. Thereafter, on or about June 27 or 28, 1984, at least three of these persons contacted Julia Girsch, BAPA's Economic Development Coordinator, and advised her that they had been solicited by Brown. *Id.* at ¶ 47.

restraining order and a preliminary injunction and a hearing seeking to enjoin both the pending criminal proceedings against Pearson, Baker and Brown, and the statute's enforcement generally. On April 3, 1986, the district court, after initially determining that an *evidentiary* hearing was unnecessary, held a hearing restricted solely to issues of law. Thus, the defendants did not submit affidavits or other evidence to controvert the allegations contained in plaintiffs' verified complaint. After the hearing, the Court denied plaintiffs' motion for a temporary restraining order but took under advisement their motion for the issuance of a preliminary injunction.

On April 25, 1986, the plaintiffs filed a joint memorandum in support of their motion for a preliminary injunction. The defendants moved to dismiss. No further hearings were held.

Some time later, on October 24, 1986, the district court granted the defendants' motions to dismiss the complaint as to all plaintiffs except Curtis on the ground that the plaintiffs had failed to allege their state court prosecutions were brought in bad faith. Absent such allegations, the court, relying on the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), declined to enjoin those proceedings. The Court stated:

> "Except as to plaintiff Brenda Curtis, each of the defendants' motions to dismiss is granted with leave to replead. *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), prevent this court from interfering with a pending state prosecution in the absence of a showing that the prosecution was brought in bad faith. Because the plaintiffs have failed to make a sufficient showing, they cannot avail themselves of this recognized exception to the *Younger* doctrine."

Additionally, the court denied the plaintiffs' motion for a preliminary injunction solely on the ground that they had failed to demonstrate a likelihood of success on the merits. In so ruling, the court addressed only one of the

five factors necessary to support preliminary injunctive relief: the likelihood of plaintiff's success on the merits. Curtis individually is the only plaintiff who appeals that portion of the district court's order denying the plaintiff's requested injunctive relief.

II.

As an initial matter, we must determine whether the district court properly denied Curtis' motion for a preliminary injunction without explicitly reciting in its order that it had considered the other four elements Curtis must prove when attempting to establish her right to an injunction. See the test set forth in *Roland Machinery Company v. Dresser Industries*, 749 F.2d 380, 382-88 (7th Cir. 1984), and expanded upon in later cases. *E.g., Lawson Products Inc. v. Avenet Inc.*, 782 F.2d 1429, 1432 (7th Cir. 1986); *Brunswick Corp. v. Jones*, 784 F.2d 271 (7th Cir. 1986). Curtis, in establishing her entitlement to a preliminary injunction, bears the burden of demonstrating:

> "(1) that [she] has no adequate remedy at law;
>
> (2) that [she] will suffer irreparable harm if the preliminary injunction is not issued;
>
> (3) that the irreparable harm [she] will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the injunction is granted;
>
> (4) that [she] has a reasonable likelihood of prevailing on the merits; and
>
> (5) that the injunction will not harm the public interest."

Brunswick Corporation v. Jones, 784 F.2d 271, 273-74 (7th Cir. 1986).

The district court's weighing of these factors is a fact-bound analysis and involves the exercise of discretion. We will reverse the court's decision only where we are con-

vinced that there has been abuse of discretion on the part of the court. *See Lawson Products*, 782 F.2d at 1436-39. Whether the plaintiff can demonstrate a reasonable likelihood of prevailing on the merits often requires a district judge to decide questions of law, as was the case here: the court found that Curtis had no chance of prevailing on the merits since her complaint failed to state a claim under the First Amendment. Therefore, this is not a situation where the probability of plaintiff's success depends on facts that are likely to emerge at trial; the issue of the sufficiency of plaintiff's complaint is solely a question of law. As with all questions of law, we review the legal issue presented *de novo*. *Thornburgh v. American College of Obstreticians*, ____ U.S. ____, 106 S.Ct. 2169, 2177 (1986). Further, "[w]hen the district court's error is the very predicate of its order, the order must be reversed as an improvident exercise of the court's discretion." *American Can Co. v. Mansukhani*, 742 F.2d 314, 326 (7th Cir. 1984). Hence, we undertake an independent review of the district court's legal conclusions in determining whether or not Curtis had any chance of prevailing on the merits. *Brunswick Corp.*, 784 F.2d at 274 n.2.

Before doing so, we must determine whether the district court's denial of the injunction without further inquiry into the balance of harms was proper. This circuit employs a "sliding scale" approach in deciding whether to grant or deny preliminary relief; so that even though a plaintiff has less than a 50 percent chance of prevailing on the merits, he may nonetheless be entitled to the injunction if he can demonstrate that the balance of harms would weigh heavily against him if the relief were not granted, *see Illinois Psychological Association v. Falk*, 818 F.2d 1337, 1340 (7th Cir. 1987)—still, the "sliding scale" approach is limited by the "likelihood of success" prong of the test. In all cases, the plaintiff must be able to demonstrate at least a "negligible" chance of success to justify injunctive relief. *Brunswick Corp.*, 784 F.2d at 275 ("Although the plaintiff must demonstrate some probability of success on the merits, 'the threshold is low. It is enough

that the plaintiff's chances *are better than negligible . . .*' ") (quoting *Roland Machinery*, 749 F.2d at 387) (emphasis added). In other words, where the plaintiff is unable to establish this minimum threshold, the harm to the plaintiff will never override his failure to establish a likelihood of success. *See Chicago Board of Realtors*, 819 F.2d 732, 741 (7th Cir. 1987).[5] Under circumstances of this nature, the failure of the district court to address factors other than the plaintiff's likelihood of success is not fatal.

The denial of an injunction based solely upon a plaintiff's failure to establish a negligible chance of success on the merits has been expressly sanctioned by this and other circuits, in cases where the parties do not dispute the district court's balancing of the equitable factors. *See, e.g., Chicago Board of Realtors*, 819 F.2d at 741; *Callaway v. Block*, 763 F.2d 1283, 1287 and n.6 (11th Cir. 1985); *U.P.S. v. United States Postal Service*, 615 F.2d 102, 106-07 (3d Cir. 1980); *Noel v. Chapman*, 508 F.2d 1023, 1024-25 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37 (1975). We refuse to adopt a more lenient rule when the district court determines that the complaint on its face fails to state a cause of action; in either instance, a court of appeals is able to reach the controlling legal issue. *Thornburgh*, 106 S.Ct. at 2177. In this case, were we to hold that a plaintiff's complaint based on the First Amendment is sufficient to establish some likelihood of success on the merits, we might very well feel constrained to remand

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[5] At oral argument, counsel for the defendant suggested incorrectly that the preliminary injunction test requires a plaintiff to show a 50 percent or better chance of prevailing on the merits before an injunction may issue. Counsel, however, has failed to cite case law, nor have we found any to substantiate this position. To the contrary, the Seventh Circuit expressly employs a "sliding scale" approach to deciding whether to grant or deny preliminary relief. *See Illinois Psychological Association v. Falk*, 818 F.2d 1337, 1340 (7th Cir. 1987). Our holding today is that a plaintiff must demonstrate a better than negligible chance of success in order to require the district court to consider the remaining factors.

for a consideration of the remaining elements. But should we agree with the district court that the plaintiff's complaint is insufficient as a matter of law, denial of an injunction on that basis alone is appropriate and proper.

III.

The propriety of the district court's action therefore depends upon whether Curtis' complaint states a claim under the First Amendment. As mentioned previously, she alleges that § 70-51(d) of the Illinois statute violates her First Amendment right to contact homeowners for the purpose of persuading them to sell or list their homes. We initially note that the speech in which Curtis wishes to engage is primarily aimed at proposing a commercial transaction, and should thus be classified as "commercial speech." *Bolger v. Young's Drug Products Corporation*, 463 U.S. 66, 103 S.Ct. 2875, 2879-81, 77 L.Ed.2d 469 (1983). Contrary to earlier holdings of the Supreme Court, our classifying plaintiff's speech as "commercial" speech does not render the First Amendment inapplicable. *See, e.g., Valentine v. Christianson*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed.2d 1262 (1942) (according commercial speech no First Amendment protection). In modern times the Supreme Court, beginning in 1975 with *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), has extended the protection of the First Amendment to commercial speech.

Nevertheless, the high court continues to apply varying levels of scrutiny to restrictions that impact upon protected speech depending upon the nature of the speech and its context. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund*, ____ U.S. ____, 105 S.Ct. 3439, 3448-51, 87 L.Ed.2d 567 (1985); *Id.* at 3456-58 (Blackmun, J., dissenting); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 1706-07, 75 L.Ed.2d 736 (1983); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984) (comparing the analysis of viewpoint-specific regulations to the review of viewpoint-neutral reg-

ulations); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 3079, 82 L.Ed.2d 221 (Marshall, J., dissenting); *see generally Redish Freedom of Expression*, 87-125 (1984); L. Tribe, *American Constitutional Law* §§ 12-2 to 12-7, § 12-20 (1978). A major theme of these authorities is that the First Amendment does not guarantee citizens the absolute right to engage in every form of speech whenever and wherever the speaker desires. *See City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1561 (7th Cir. 1986) (Coffey, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976) (the guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.").

In the area of non-commercial speech, content-based restrictions (such as the one at hand) are sustained only in the most extraordinary circumstances: "[t]he First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 104 S.Ct. at 2128. This is because such "core" First Amendment speech has always been considered essential to our survival as a democratic society: "[f]ree speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Lousiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-16, 13 L.Ed.2d 125 (1964). By contrast, regulation of commercial speech based upon content is less problematic. Because of the greater potential for deception or invasions of privacy in the context of some advertising methods, content-based restrictions on commercial speech are more often upheld. *Bolger*, 103 S.Ct. at 2879; *Schultz v. Frisby*, 807 F.2d 1339, 1355-72 (7th Cir. 1986) (Coffey, J., dissenting), *rehearing en banc granted and decision vacated*, 818 F.2d 1284 (7th Cir. 1987), *aff'g by equally divided vote* 619 F. Supp. 792, 822 F.2d 642 (7th Cir. 1987), *cert. granted*, 1988 U.S.L.W. 2211 (Jan. 11, 1988).

Consequently, the communications Curtis wishes to engage in are entitled to the "qualified, but nonetheless substantial protection accorded to commerical speech." *Bolger*,

103 S.Ct. at 2875. The precise protection available to a particular type of commercial expression "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). In *Central Hudson*, the Court adopted this four-part analysis for assessing the validity of a restriction on commercial speech:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

100 S.Ct. at 2351. Applying this test, we conclude that § 70-51(d) of the Illinois statute is constitutional as applied to Curtis' proposed speech.

Under the first prong, it is not seriously disputed that Curtis' proposed speech, standing alone, is protected under the First Amendment. As stated above, to pass muster under this prong, it is enough to demonstrate that the speech "concerns lawful activity and is not misleading." *Id.* While the state of Illinois may proscribe what constitutes false, deceptive or misleading sales techniques, *Virginia Pharmacy Board v. Virginia Citizens' Consumer Council Inc.*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 1830-31, 48 L.Ed.2d 346 (1976), and prohibit commercial speech related to illegal behavior, *Pittsburgh Press Company v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973), none of Curtis' actions or proposed activities fall within the parameters of these categories. To the contrary, the free flow of in-

formation concerning the purchase and sale of residential real estate properties implicates "one of the most important decisions [citizens] have a right to make: where to live and raise their families." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). In our opinion, the subject matter of Curtis' proposed commercial speech, standing alone, is protected under the First Amendment.

Next, we must determine whether the state's admittedly substantial interest in preventing inducements to sell real estate by appealing to the fear of racial integration is directly advanced by § 70-51(d). Curtis argues, and Amicus agrees,[6] that it is not directly advanced because the "defendants have produced no evidence that these elicit practices are problems in Illinois or Beverly today. Nor have they offered any evidence on how the statute prevents, or how truthful, non-misleading solicitation causes blockbusting and panic peddling." (Brief of plaintiff-appellant Brenda Curtis, at page 21). Despite the fact that the Illinois Supreme Court has specifically held that the statute directly furthers the goal of preventing "blockbusting," *People v. C. Betts Realtors Inc.*, 66 Ill.2d 144, 151, 361 N.E.2d 581, 584 (1977),[7] they nonetheless maintain it does not in fact achieve this goal. Curtis and Amicus finally note that because the state has enacted a number of

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[6] The National Association of Realtors, a not-for-profit professional association for persons engaged in all phases of the real estate business, was granted leave to file an *amicus curiae* brief in support of Curtis' appeal. The Association argues strenuously that § 70-51(d) unjustifiably interferes with the free flow of information about the availability and value of residential real estate by restricting the brokers' ability to communicate with the public.

[7] Both Curtis and the Association criticize *Betts* for its failure to thoroughly analyze whether § 70-51(d) was drawn narrowly enough to achieve its stated purpose without unduly restricting the First Amendment rights of realtors. Although *Betts* did summarily conclude, on the basis of the parties' agreement, that "the primary purpose of the Act is to prevent 'blockbusting' or 'panic peddling,' " 361 N.E.2d at 583-84, the bulk of the court's opinion rests on the privacy issue.

laws prohibiting blockbusting directly, the necessity of the further steps taken by the statute are superfluous. *See Virginia Board of Pharmacy*, 425 U.S. at 468 ("[t]he strength of [defendant's] proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation that pharmacists in Virginia are subject."). Curtis raises an interesting question when she questions whether the regulation does advance the government's interest in a meaningful way to prevent blockbusting, but this argument ignores another overriding interest the state of Illinois argues is served by the statute: the interest in insuring the privacy of the homeowner. In our view, that interest is more than sufficient to justify the limited curtailment of Curtis' right to speak to citizens in their homes.

Admittedly, a homeowner's right to privacy is not the original interest § 70-51(d) was intended to protect. Curtis latches onto this fact and characterizes the state's reliance upon this justification as an "afterthought." Whether it was an afterthought, however, is immaterial, since any "insufficiency of the original motivation does not diminsh other interests that the restriction may now serve." *Bolger*, 103 S.Ct. at 2883. *See also Ohralick v. Ohio State Bar Association*, 436 U.S. 447, 460, 98 S.Ct. 1920, 56 L.Ed.2d 444 (1978); *F. Doe v. Bolton*, 410 U.S. 179, 190-91, 93 S.Ct. 739, 746-47, 35 L.Ed.2d 201 (1973) (a state may readjust its views and emphases in light of modern knowledge).

Unquestionably, Illinois' interest in ensuring the privacy of its residents while they are at home is strong and valid, even in the face of the First Amendment. The right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights; moreover, the unique importance of the right to privacy *in the home* has, from time immemorial, been amply demonstrated in our constitutional jurisprudence. As early as 1886, the United States Supreme Court recognized that the Fifth Amendment protects against all gov-

ernmental invasions "of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). The First Amendment has been held to encompass the right to "privacy and freedom of association in the home." *Moreno v. United States Dep't of Agriculture*, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

In *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.E.2d 542 (1969), the Supreme Court overturned a state conviction for possession of obscene material, holding "that the First and Fourteenth Amendment prohibit making the private possession of obscene material a crime." The Court recited: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564, 89 S.Ct. at 1247. The *Quilici* dissent, *Quilici v. Village of Morton Grove*, 695 F.2d 261, 279 (7th Cir. 1982) (Coffey, J., dissenting), explains *Stanley*'s recognition of the right to privacy in the home as fundamental to this nation's concept of ordered liberty:

> "The Court has made it clear that its *Stanley* decision was not based on the idea that obscene matter is itself protected under the right of privacy. Rather, the focus in *Stanley* was on the fact that the activity prohibited by the Georgia statute occurred in the privacy of the home. In *United States v. Reidel*, 402 U.S. 351, 356, 91 S.Ct. 1410, 1412, 28 L.Ed.2d 813 (1971), the Court rejected the argument that commercial distribution of pornography is constitutionally protected and held that the 'focus' of Stanley was 'on freedom of mind and thought and on the privacy of one's home.' Subsequently, the Court in *United States v. Orito*, 413 U.S. 139, 142, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513 (1973) stated 'the Constitution extends special safeguards to the privacy of the home' and there exists a 'myriad' of activities which may be pro-

> hibited in public but which may be lawfully conducted within the privacy and confines of the home.
>
> Most importantly, the Supreme Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), held that *Stanley* was decided 'on the narrow basis of the "privacy of the home" which was hardly more than a reaffirmation that *"a man's home is his castle."* ' (emphasis added)."

695 F.2d at 279-80. Justice Black's concurrence to *Gregory v. City of Georgia*, 394 U.S. 111, 125, 89 S.Ct. 946, 953-54, 22 L.Ed.2d 134 (1969) also highlights the importance of privacy in our society:

> "Were the authority of government so trifling as to permit anyone with a complaint to have asked power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to scoff and jeer; streets and highways and public buildings would cease to be available for the purpose for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. *And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and daily way of living, would have to have their doors thrown open to all who desire to convert the occupants to a new view, new morals and a new way of life.*"

(Emphasis added). *See also Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Pole v. Ullman*, 367 U.S. 497, 551-52, 81 S.Ct. 1752, 1781-82, 6 L.Ed.2d 989 (1961) (Douglas, J., dissenting). When the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial trans-

action.[8] For instance, in *Kovacs v. Cooper*, 336 U.S. 77, 81, 69 S.Ct. 448, 450, 93 L.Ed. 513 (1949), the Supreme Court upheld an ordinance which prohibited the use of sound trucks on residential streets. The court explained that the interest in preventing interference with the activities of residents "or the quiet they would like to enjoy" was sufficient to justify the ordinance involved.

Likewise, in *Rowan v. United States Post Office Department*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970), a case almost directly on point, the Supreme Court upheld as constitutional the federal statute that empowers the post office, upon request of an individual, to require that a sender of unsolicited mail remove the name and address of the individual from its mail lists. *See* 39 U.S.C. § 3008. The statute upheld in *Rowan* provides a procedure whereby any householder may insulate himself from advertisements that offer for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." 39 U.S.C. § 4009(a) (1964). Thus, under *Rowan*, the individual is able to stop the delivery of what he believes to be sexually provocative material to his private residence without interfering with the mailer's general right to disseminate its materials to "willing" recipients. The Court, citing *Martin v. City of Struthers*, 319 U.S. 141 (1943), recognized "the very basic right to be free from sights, sounds, and tangible matter" in the privacy of our homes:

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[8] For instance, the state's interest in regulating expressive conduct is even greater where the expressive conduct threatens to (or does) impinge on the exercise of equally important constitutional rights (e.g., privacy) of others:

> "Although American constitutional jurisprudence, in light of the First Amendment, has been zealous to preserve access to public places for purposes of freedom of speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."

Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03, 94 S.Ct. 2714, 2716-17, 41 L.Ed.2d 770 (1974).

> " . . . Mr. Justice Black, for the Court, while supporting the '[f]reedom to distribute information to every citizen,' . . . acknowledged a limitation in terms of leaving 'with the homeowner himself' the power to decide 'whether distributors of literature may lawfully call at a home.' . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.
>
> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. . . . *In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.*"

90 S.Ct. at 1490 (citations omitted) (emphasis added). As in *Rowan*, the Illinois statute in this case circumscribes the mailer's right to communicate only by the addressee's taking affirmative action in giving notice to the mailer that he wishes no further mailings from his enterprise. The fact that the federal statute approved in *Rowan* involved sexually explicit materials, while the state statute involves solicitation to sell real estate, does not render *Rowan*'s conclusion inapplicable:

> "Both the absoluteness of the citizen's right under § 4009 and its finality are essential; what may not be provocative to one person may well be to another. *In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents*—or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possi-

> ble constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.
>
> In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped."

Id. at 1491 (emphasis added).

The similarity of the instant case to *Rowan* makes out a powerful argument in favor of upholding the constitutionality of the Illinois statute. In both situations, the right of privacy in the home must override the mailer's right to communicate once the homeowner notifies that particular mailer that he wishes no further mailings. Further, the continued vitality of the *Rowan* decision has been reaffirmed by the Supreme Court as recently as 1983. *See Bolger*, 103 S.Ct. 2875, 2883 n.25 (1983). Again, quoting Justice Black in *Gregory*:

> "No mandate in our Constitution leaves states and governmental units powerless to pass laws to protect the public from the kind of boisterous, threatening conduct *that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burley of the outside business and political world*, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries and hospitals."

394 U.S. at 118, 89 S.Ct. at 950 (emphasis added). Finally, as was explained in *Schultz v. Frisby*, 807 F.2d at 1359 (Coffey, J., dissenting):

> "As important as free speech is to preserving our freedom, the right of privacy which ensures the opportunity for peace, tranquility, comfort, and personal solace away from the often overwhelming bombardment of unsolicited communications from political, commerical, and religious groups, enterprises, and organizations cannot be any less important in a society whose existence depends on the ability of each individual (as well as the majority) to conscientiously exercise his or her judgment in the conduct of their own affairs and those of their locality and nation. The conscientious exercise of judgment upon which we depend can hardly be exercised in the absence of the privacy necessary for contemplation and reflection. To hold that the right of free speech outweighs all other individual rights . . . goes far beyond the boundaries the Supreme Court has established when considering the limitations on the right of free speech. The . . . unwarranted expansion of the right to freedom of speech under the First Amendment leaves a foundation for transforming the right of free speech from a tool of freedom and democracy into a weapon of injustice."

Contrary to Curtis' argument, the regulation in issue meets the *Central Hudson* test because it directly advances the goal of ensuring privacy in the home. As was the case in *Rowan*, once a homeowner expresses his or her desire not to receive certain types of literature he or she determines to be objectionable, there simply is no further right to press those ideas on the unwilling recipient:[9]

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[9] Many of the cases cited by Curtis, which strike down blanket restrictions on certain types of commercial speech, are distinguishable for the reason that the recipient in those cases had not previously expressed the desire to be shielded from the particular communication. Moreover, many of the cases do not involve communications impacting on a homeowner's right to privacy. For instance, in *Linmark Association Inc. v. Township of Willingboro*,

(Footnote continued on following page)

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere . . . . *The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.*"

90 S.Ct. at 1491 (emphasis added).

Curtis responds that the statute is under-inclusive because it does not prohibit forms of mail other than real estate solicitations from entering the home. Mere under-inclusiveness does not, however, amount to constitutional infirmity. As explained previously, a restriction on commercial speech may well be valid where it "directly advances the governmental interest asserted, and . . . is not

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[9] *continued*

431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), the Court invalidated a township ordinance prohibiting the posting of "for sale" and "sold" signs on residential property. Although the statute's purpose was to stem what the township perceived as the flight of white homeowners from a racially integrated community, the Court found insufficient proof to establish that a sign ban would alleviate the problem without unduly restricting the flow of truthful commercial information. 97 S.Ct. at 1618-21. That case, however, did not involve a statute aimed at protecting a homeowner's privacy, nor were the communications directed to persons who had previously expressed a desire to be left alone. It is also on this basis that Curtis' citations to *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (Supreme Court invalidated an Ohio disciplinary rule which prohibited lawyers from soliciting business through the use of truthful advertisements), and *Coldwell Banker v. Clayton*, 105 Ill.2d 359, 375 N.E.2d 536 (1985) (Illinois Supreme Court struck down statute prohibiting real estate brokers from offering inducements to potential clients) are unpersuasive.

more *extensive* than is necessary to serve that interest." *Central Hudson*, 100 S.Ct. at 2351. While the Illinois statute could have been *more* extensive, the state's decision to limit the scope of the statute does not translate into a constitutional problem[10]:

> "For the Legislature absolutely and conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. *So it may take the less step of limiting the public use to certain purposes.*"

Davis v. Massachusetts, 167 U.S. 43, 47, 17 S.Ct. 731, 733, 42 L.Ed. 71 (1897) (emphasis added). Essentially, Curtis' contention that the statute is under-inclusive asks us to second-guess the Illinois General Assembly and hold the

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[10] Curtis' argument can be viewed as the flip side of the "narrowly tailored test" a time, place, or manner regulation on speech must meet. Under that test, a statute is narrowly tailored if it "[does] no more than eliminate the exact source of the evil it sought to remedy . . ." *Taxpayers for Vincent*, 104 S.Ct. at 2131. *See also City of Watseka*, 796 F.2d at 1562-67 (Coffey, J., dissenting) (discussing the difference between the "narrowly tailored test" and the "less-restrictive-mean" analysis under the overbreadth doctrine). In this case, § 70-51(d) meets this test since it only prohibits solicitation once the property owner has given notice he does not wish to sell his property. But Curtis argues, in effect, that the statute is *too narrowly* tailored since a broader prohibition could have achieved the goal of insuring privacy. As explained in this opinion, a statute that directly advances the desired goal is not invalid merely because it could have been drafted in a more expansive fashion. In this case, the narrowness of the statute is the result of its attempt to achieve its primary purpose of preventing blockbusting. But the privacy interests now directly and narrowly served by § 70-51(d) operate to justify the very limited infringement upon the First Amendment rights of sellers of real estate.

statute unconstitutional merely because we may believe that Illinois could have prohibited more expressive conduct in an effort to achieve its stated purposes. But "[e]ven on matters touching the First Amendment, courts must accept plausible judgments by other governmental actors." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting). *See also Turner v. Safley*, 107 S.Ct. 2254, 2264-65 n.** (1987); *Munro v. Socialist Workers Party*, 107 S.Ct. 533, 537-38 (1986).[11]

It is axiomatic that state governmental entities are vested with the responsibility of enacting laws for the protection of the public under its police powers. *Schultz v. Frisby*, 807 F.2d at 1360 (Coffey, J., dissenting). As the United States Supreme Court explained: "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare . . ." *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952).

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[11] The dissent states that further development of the record is necessary to determine if there exists "a sufficiently tight 'fit' between the legislature's ends [securing the privacy of its citizens] and the means chosen to accomplish those ends [the banning of real estate solicitations when a homeowner affirmatively expresses to the solicitor his or her desire to be left alone]." But if the state's decision as to where to draw the line between ends and means is reasonable, a court may not use its own findings to upset a plausible state decision. *Vance*, 440 U.S. at 110-12. As we point out in the text of the opinion, Illinois' decision in this case is reasonable in light of *Rowan*'s central holding—that a state may "permit people to insulate themselves from categories of speech . . . [if] the government . . . leave[s] the decision about what items are forbidden in the hands of the potentially offended recipients" *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985). Returning this case to the district court for further development of the record is not only unnecessary, but it may very well serve to give the wrong signal to the trial court to substitute its judgment for that of the duly elected representatives of the citizens of Illinois, the Illinois legislature.

Therefore, especially when factual issues determine the constitutionality of governmental action, a federal court may not use its own findings to upset plausible state decisions. *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979). Illinois' decision to limit the reach of § 70-51(d) falls well within that realm of plausible judgment.

Our holding today is narrow: once a homeowner gives notice to a person that he or she does not desire to have the home listed for sale and that he or she does not desire to be contacted by real estate brokers who have previously been made aware of the decision, the right of a homeowner to decide what he or she will or will not hear, under the right to privacy, plainly outweighs the right of a real estate broker to continue to contact that person in his or her home.[12] Once actual notice is received by a real estate agent, that agent is barred from contacting the homeowner for the purpose of persuading him or her to list the residence for sale. Our holding prevents neither a buyer nor a seller of real estate from contact-

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[12] Curtis additionally maintains that § 70-51(d) is unconstitutionally vague under the due process clause of the Fourteenth Amendment since the word "solicitation" as it is used in the statute insufficiently informs the citizenry what conduct is prohibited. The argument is not convincing. "A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct." *Rowan*, 397 U.S. at 740, 90 S.Ct. at 1492. In this case appellant knows precisely what she must refrain from doing on receipt of statutory notice. The complainants' names must be removed from any mailing list the broker may have, and the broker must refrain from future communications to the named addressees. Appellant runs no substantial risk of miscalculation. Further, at least one Illinois court has explained the meaning of "solicitation" for the purposes of § 70-51(d), *see People v. Beaulieu Realtors Inc.*, 144 Ill. App. 3d 580, 494 N.E.2d 504, 507 (1986); its meaning in this context is sufficiently clear to satisfy due process. Similarly, Curtis' claim that the statute violates equal protection because it has no rational basis is without merit. Our holding that the provision directly advances the state's interest in ensuring the privacy of homeowners forecloses Curtis' equal protection challenge.

ing any person who has not notified the particular broker that he wishes to be left undisturbed.

One final note merits attention. Courts, as contrasted with legislatures, are far removed from the daily problems facing our elected representatives; we are cognizant of the fact that we must confine our analysis to the First Amendment constitutional question presented herein as to whether the statute reasonably accommodates the right of the speaker to reach willing audience members, the rights of the willing audience to receive the message, and the rights of the unwilling audience to their personal privacy. This case also illustrates the care that must be taken to accord the various branches of government their proper roles in our system of "checks and balances." The constitutions of the United States and the respective states define and delineate the authority, jurisdiction and powers of our various governmental units. As a fundamental principle, if a governing body (federal, state or local) should at any time overstep its limits, the judiciary must act as a constitutional check. This was the intent of the framers of the Constitution as evidenced by their dividing and separating the powers and responsibilities of each unit into three separate and distinct branches. Specifically, if a legislative body enacts a law exceeding the constitutional limits of its authority, it is the responsibility and the duty of an independent judiciary to rule on the same. On the other hand, in the absence of a constitutional violation, determining where to strike the balance between the competing interests is more properly a matter for the legislature, not for the Court. The Constitution wisely vests that branch of the government with the power and authority of law making, for the legislature is better equipped to carry out that task in that interested parties, such as state and local governmental representatives, homeowners, real estate brokers, etc., are able to present their respective positions before the legislative body in a more open, unrestricted, informal forum. Thereafter, the myriad of questions and problems, as well as their possible solutions, are brought before the entire legislative branch of govern-

ment and are subject to the scrutiny of public hearings and debates. When dealing with the complex and ever-changing question of an individual's rights under the First Amendment, as contrasted with those of society as a whole and/or a governmental agency, whether it be a municipal, county, state or federal governmental entity, the fact-finding and policy making capabilities of a court of law are far more limited and confined due to the very being of a court law, enshrined with its technical rules of evidence as to admissibility and materiality that often serve to limit a court's ability to make a clear, definitive, and thus reasoned pronouncement on matters of public policy.

Consequently, a truly independent judiciary must always exercise its powers of review and decision making with discretion and reservation, giving due deference to the other branches of government. Our judicial responsibility obligates us to declare an act by another governmental unit to be void if we believe the enacted law is contrary to the principles of the Constitution. After reviewing Ill. Rev. Stat. Ch. 38 § 70-51(d), we are convinced that the expressed will of the people as enacted in the Illinois statute is not contrary to the principles of the Constitution, we should not, and will not, interfere with this judgment of the legislature, a coequal branch of government.

This excerpt from *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) is particularly apt:

> "A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home."

319 U.S. at 148-49, 63 S.Ct. at 866.

We hold that the district court properly denied plaintiff's motion for a preliminary injunction based upon her failure to establish a reasonable likelihood of prevailing on the merits. Curtis' First Amendment right to engage in commercial speech is properly limited by the state's legitimate interest in ensuring the privacy of its citizens, an interest which is narrowly served by prohibiting the solicitation of residential property owners once they have expressed their desire to be left alone. The decision of the district court is AFFIRMED.

ESCHBACH, *Senior Circuit Judge*, concurring. Although I concur in the result reached by the court, I write separately to make two points. First, although I believe that the holding in *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S. Ct. 1484, 25 L.Ed.2d 736 (1970) is relevant here and much of its analysis helpful, I do not find it dispositive. Careful examination of the analysis in *Rowan* reveals that its holding was founded on the implied but obvious determination that the federal statute at issue there was content neutral in that it involved no ". . . discretionary evaluation of the material [by] a governmental official." The Illinois statute at issue in the present case cannot be construed as content neutral because it clearly proscribes one type of communication (real estate solicitations) and mandates criminal penalties for violation of that proscription. For that reason I believe *Rowan* to be distinguishable from this case.

I must also point out that while I neither agree nor disagree with the observations set forth in the final four pages of the majority opinion pertaining to the subjects of judicial restraint and the proper role of the federal judiciary, I do not believe those views are necessary to the proper disposition of this case. Therefore, I expressly decline to join in them.

RIPPLE, *Circuit Judge*, dissenting. The opinions of my brothers manifest that they have given much careful thought to the disposition of this case and it is with great reluctance that I must decline to join them. However, appellate courts, no matter how hard they try to fashion a comprehensive and integrated workproduct, are bound by the record that has been made in the trial court. Here, the truncated methodology employed by the district court has left us with an inadequate basis for resolution of the issues before us. Accordingly, I would remand this case to the district court for further development of the record.

The grant or denial of a preliminary injunction is, of course, a matter committed to the sound discretion of the trial judge. That decision ought to be disturbed only when there has been an abuse of discretion. *See Lawson Prods. v. Avnet, Inc.*, 782 F.2d 1429, 1436-39 (7th Cir. 1986). However, the use of such a deferential standard of review by the appellate court presumes that the district court has employed the appropriate judicial methodology and that the decision to grant or deny the preliminary injunction is the product of a considered evaluation of the criteria contained in that methodology.

The appropriate judicial methodology for considering a request for a preliminary injunction has been set forth in numerous opinions of this court. *See, e.g., Brunswick Corp. v. Jones*, 784 F.2d 271, 273-74 (7th Cir. 1986); *Lawson Prods.*, 782 F.2d at 1432; *American Hosp. Supply Corp. v. Hospital Prods.*, 780 F.2d 589, 593 (7th Cir. 1985); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 382-83 (7th Cir. 1984). The majority opinion has summarized those steps quite succinctly:

> Curtis, in establishing her entitlement to a preliminary injunction, bears the burden of demonstrating:
>
> "(1) that she has no adequate remedy at law;
>
> (2) that she will suffer irreparable harm if the preliminary injunction is not issued;

> (3) that the irreparable harm she will suffer if the preliminary injunction is not granted is greater than the irreparable harm the defendant will suffer if the injunction is granted;
>
> (4) that she has a reasonable likelihood of prevailing on the merits; and
>
> (5) that the injunction will not harm the public interest."

Brunswick Corporation v. Jones, 784 F.2d 271, 273-74 (7th Cir. 1986).

In this case, the district court addressed only one of the five factors. It denied the plaintiffs' motion for a preliminary injunction because, in the district court's view, they had failed to demonstrate a likelihood of success on the merits. Moreover, the district court reached this conclusion without holding, despite the request of the parties, an evidentiary hearing. As reflected in its one-page minute order—only one paragraph of which is devoted to Ms. Curtis' case—the district court was of the view that the decision of the Supreme Court of the United States in *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), and the decision of the Illinois Supreme Court in *People v. C. Betts Realtors*, 361 N.E.2d 581 (Ill. 1977), were "authoritative" and "necessitate denial of the motion for preliminary injunction." I respectfully suggest that such a truncated treatment of Ms. Curtis' case was inappropriate.

An evaluation of the merits of Ms. Curtis' case must begin with the basic reality that it involves rights of freedom of expression protected by the first amendment—commercial speech, but speech nonetheless. As the majority opinion correctly points out, commercial speech may be regulated in a manner quite different from other forms of speech. As my brothers also point out, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Supreme Court set forth a four-step analysis for assessing the validity of a restriction on commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

There is no real dispute with respect to the first prong of this test. Information about the state of the local real estate market concerns lawful activity. The second prong is also not troublesome. There is a substantial governmental interest in preventing discrimination in housing. There is also a substantial governmental interest in protecting a person's legitimate expectation of privacy in the home. The next two prongs of the *Central Hudson* test are somewhat more difficult and, in my view, deserve a more comprehensive analysis than that given them by the district court or the majority. On this record, it is not established that the statute directly advances either of these governmental interests. As the majority notes, the record contains no evidence that the problem of blockbusting exists in Illinois or in Beverly today. Nor does the record contain any evidence as to how a curb on the truthful, non-misleading communication by a member of the real estate profession will advance directly the government's attempt to end such racially discriminatory practices. *Cf. Linmark Assocs. v. Willingboro*, 431 U.S. 85, 95 (1977) (noting that the record failed to establish that "this ordinance is needed to assure that Willingboro remains an integrated community" (footnote omitted)).

The majority correctly notes that the government may assert in defense of the statute an interest other than that which prompted the original enactment of the statute. *See*

Bolger v. Youngs Drug Prods., 463 U.S. 60, 71 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978); *Doe v. Bolton*, 410 U.S. 179, 190-91 (1973). The state certainly does have a strong interest in ensuring the privacy of the home. Yet, again, there is no record to support the proposition that this statute directly protects that interest. We do not know, on this record, the extent of real estate solicitation activity. Moreover, while the underinclusiveness of the statute certainly does not doom it under this prong, see *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 106 S. Ct. 2968, 2977-78 (1986), we cannot ignore, at this very early stage in the development of the record, that, if Illinois meant to protect the privacy of the home from commercial intrusion, it apparently chose a rather feeble approach. There is nothing in the record to support the conclusion that real estate solicitation is any more a threat to the privacy of the home than other forms of commercial intrusions. *See id.* at 2978 and n.8.

The last prong of the *Central Hudson* test presents a particularly troubling problem on this record. That prong requires that the restriction on commercial speech be "not more extensive than is necessary to serve that interest." 447 U.S. at 566. Certainly, the language of the statute (and no narrowing construction has been suggested, see *Posadas*, 106 S. Ct. at 2975-76) is very broad. It prevents—apparently—all real estate solicitation at any place (not just the home) at any time by anyone. *See generally People v. Beaulieu Realtors*, 494 N.E.2d 504, 508 (Ill. App. Ct. 1986).

It may be that further development of the record would establish a sufficiently tight "fit" between the legislature's ends and the means chosen to accomplish those ends. However, the record before us hardly allows us to reach that conclusion. At this stage in the litigation, therefore, we must conclude that " 'the plaintiff's chances are better than negligible. . . .' " *Brunswick*, 784 F.2d at 275 (quoting *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982)).

It is also suggested that any infirmity with respect to the "fit" created by the Illinois statute is neutralized by the fact that, as in the case of the statute at issue in *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), this statute permits the exclusion of the material only when the intended recipient declares a desire not to receive the material. *Rowan* does provide some support for the constitutionality of this Illinois statute. The case "shows that a state may permit people to insulate themselves from categories of speech . . . but the government must leave the decision about what items are forbidden in the hands of the potentially offended recipients." *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985). However, as Judge Eschbach has cogently noted, the Illinois statute is not on "all fours" with the statute at issue in *Rowan*, 39 U.S.C. § 3008. In *Rowan*, the Supreme Court specifically noted that the recipient could designate *any* material as offensive. With respect to that designation—no matter how broad it might be—the recipient would receive the protection of the statute. The absolute right of the recipient under *Rowan* to refuse any mail was again stressed in *Bolger*:

> Title 39 U.S.C. § 3008, a prohibition of "pandering advertisements," permits any householder to insulate himself from advertisements that offer for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." § 3008(a). The addressee's rights are absolute and "unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise." *Rowan*, 397 U.S., at 737.

463 U.S. at 72 n.25. On the other hand, here, the statute places significant restrictions on the recipient's ability to preclude material. Only solicitations with respect to residential realty are covered. Moreover, while under *Rowan* the recipient could bar mail communications *at his address*, under the Illinois statute the recipient may apparently bar any message directed to him anywhere. Re-

liance on *Rowan* is therefore not a sufficient basis to justify the district court's failure to address, in preliminary fashion, all of the criteria governing a motion for a preliminary injunction.

In sum, the merits of the plaintiff's constitutional argument must, at this very preliminary state of the litigation, be characterized as "better than negligible." *Brunswick*, 784 F.2d at 275. It was not, therefore, appropriate for the district court to deny the motion for a preliminary injunction without addressing each of the criteria set forth in *Brunswick*. We must, despite the level of present caseloads, resist the temptation to short-cut well-established analytical patterns in complex cases. This judicial discipline is especially important in the constitutional case where the ultimate values of our society are affected incrementally by every stroke of our pen. Accordingly, I would reverse the judgment of the district court and remand the case for further development of the record.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 5, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

BRENDA CURTIS,

Plaintiff-Appellant,

No. 86-2921 vs.

JAMES R. THOMPSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 2181—BRIAN BARNETT DUFF, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 2181 Date: October 24, 1986

Name of Assigned Judge: Brian Barnett Duff

Case Title: Pearson, et al. v. Thompson, et al.

MOTION:

Motion to dismiss of defendants Thompson and Hartigan; defendant Daley's motion to dismiss; defendant Beverly Area Planning Association's motion to dismiss; plaintiffs' motion for a preliminary injunction

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

* * * * *

(Reverse Side of Order of October 24, 1986)

Except as to plaintiff Brenda Curtis, each of the defendants' motions to dismiss is granted with leave to replead. *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), prevent this court from interfering with a pending state prosecution in the absence of a showing that the prosecution was brought in bad faith. Because the plaintiffs have failed to make a sufficient

showing, they cannot avail themselves of this recognized exception to the *Younger* doctrine.

Brenda Curtis is able to avoid the dismissal because there is no evidence that the other plaintiffs could adequately represent her interests in the state court proceeding. *See Doran v. Salem Inn*, 422 U.S. 922, 926-29 (1975); *Marsico v. Elrod*, 469 F. Supp. 825, 829-31 (N.D. Ill. 1979).

Brenda Curtis' motion for a preliminary injunction is denied because she cannot demonstrate a likelihood of success on the merits. *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), upheld the constitutionality of a statute very similar to this one, and *People v. Betts*, 66 Ill.2d 144 (1977), upheld the identical statute against nearly identical constitutional challenges. These cases remain authoritative, and necessitate denial of the motion for preliminary injunction.

As to the part of the case that is being dismissed, such dismissal is appropriate because the plaintiffs have not demonstrated that they would suffer any prejudice from a dismissal. Dismissal is the usual result in *Younger* abstention cases. *See Shaw v. Matteson*, No. 85 C 10323, slip ops. (N.D. Ill. January 17, 1986 and March 26, 1986).

/s/ BRIAN BARNETT DUFF

[Leave to File Granted September 14, 1989]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALVIN D. PEARSON; MARDIE BROWN; BRENDA CURTIS; CENTURY 21 PEARSON, INC. REALTORS, an Illinois corporation,

Plaintiffs,

v.

JAMES R. THOMPSON, *et al.*,

Defendants.

No. 86 C 2181—Honorable Brian B. Duff

AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their attorneys, for their complaint against defendants, allege as follows:

1. This action is brought pursuant to 42 U.S.C. §§1983 and 1985 and 28 U.S.C. §§2201 and 2202 to redress the deprivation, under color of state law, of rights guaranteed to plaintiffs by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek a declaration that *Ill.Rev.Stat.* ch. 38 §70-51(d) (the "Statute") is unconstitutional and injunctive relief against its enforcement.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §1343.

Parties

3. Plaintiff Alvin D. Pearson ("Pearson") is a resident of Illinois and is engaged in the business of real estate brokerage.

4. Plaintiff Mardie Brown ("Brown") is a resident of Illinois and was at all relevant times engaged in the business of real estate brokerage.

5. Plaintiff Brenda Curtis ("Curtis") is a resident of Illinois and is engaged in the business of real estate brokerage.

6. Plaintiff Century 21 Pearson, Inc. Realtors ("Century 21 Pearson") is an Illinois corporation. The business of Century 21 Pearson is real estate brokerage. Pearson is the majority shareholder of Century 21 Pearson. The remaining shares are owned by Pearson's wife.

7. Defendant James R. Thompson ("Thompson") is the Governor of the State of Illinois. Under Article 5 Section 8 of the Illinois Constitution, Thompson exercises the supreme executive power of the State of Illinois and is responsible for the faithful execution of its laws.

8. Defendant Neil F. Hartigan ("Hartigan") is the Attorney General of the State of Illinois. Under Article 5 Section 15 of the Illinois Constitution, Hartigan is the legal officer of the State and is responsible for enforcing the State's laws.

Former Parties

9. Plaintiff Harold T. Baker ("Baker") was a resident of Illinois and was engaged in the business of real estate brokerage. Baker died after commencement of this suit.

10. Defendant Richard M. Daley ("Daley") was the State's Attorney for Cook County. Daley was responsible for the enforcement of the State's laws in Cook County. Daley was dismissed as a defendant by means of a stipulation dated November 4, 1988, under which Daley agreed to be bound by any declarations as to the constitutionality and enforcement of *Ill.Rev.Stat.* ch. 38 §70-51(d).

11. Defendant Beverly Area Planning Association ("BAPA") is an Illinois not-for-profit corporation. The case against BAPA was concluded by entry of a consent decree dated November 4, 1988.

Non-Party Instrumentalities

12. Anthony C. Sabbia ("Sabbia") was at all relevant times an Assistant State's Attorney for Cook County.

13. Richard A. Kopeikin ("Kopeikin") was at all relevant times an Investigator for the State's Attorney's Office in Cook County.

14. Rodney D. Merrick ("Merrick") was at all relevant times an Investigator for the State's Attorney's Office in Cook County.

15. Julia Girsch ("Girsch") was at all relevant times BAPA's Economic Development Coordinator.

16. Veronica Costello ("Costello") was at all relevant times the Director of BAPA's Housing Center.

17. Virginia Rugai ("Rugai") was at all relevant times the former Director of BAPA's Housing Center.

18. Suzanne Eiben ("Eiben") was at all relevant times an Illinois resident.

19. Mary Fahrer ("Fahrer") was at all relevant times an Illinois resident.

COUNT I: VIOLATION OF FIRST AMENDMENT RIGHTS

20. *Ill.Rev.Stat.* ch. 38 §70-51 provides in part:

> It shall be unlawful for any person or corporation knowingly:
>
> > (d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property. For the purpose of this subsection, notice must be provided as follows:
> >
> > (1) The notice may be given by the owner personally or by a third party in the owner's name, either in the form of an individual notice or a list, provided it complies with this subsection.
> >
> > (2) Such notice shall be explicit as to whether each owner on the notice seeks to avoid both solicitation for listing and sale, or only for listing, or only for sale, as well as the period of time for which any avoidance is desired. The notice shall be dated and either of the following shall apply: (A) each owner shall have signed the notice or (B) the person or entity preparing the notice shall provide an accompanying affidavit to the effect that all the names on the notice are, in fact, genuine as to the identity of the persons listed and that such persons have requested not to be solicited as indicated.
> >
> > (3) The individual notice, or notice in the form of a list with the accompanying affidavit, shall

> be served personally or by certified or registered mail, return receipt requested.

21. The term "solicit" is not defined by *Ill.Rev.Stat.* ch. 38 §70-51.

22. *Ill.Rev.Stat.* ch. 38 §70-52 provides that a first offense under §70-51 is a Class A misdemeanor, and that a second violation after a conviction is a Class 4 felony.

23. The penalty for a Class A misdemeanor is imprisonment for up to one year and a fine of up to one thousand dollars. *Ill.Rev.Stat.* ch. 38 §§1005-8-3(a)(1), 1005-9-1(a)(2). The penalty for a Class 4 Felony is imprisonment for one to three years and a fine of up to ten thousand dollars. *Id.* §§1005-8-1(a)(7), 1005-9-1(a)(1).

24. *Ill.Rev.Stat.* ch. 38 §70-53 provides:

> When a person is convicted of any violation of [§70-51], the clerk of the court *shall* report such conviction to the Department of Registration and Education, which *shall* thereupon revoke any certificate of registration as a real estate broker or real estate salesman held by such person.

(Emphasis added.)

25. The Illinois General Assembly's sole purpose in enacting the Statute was to prohibit solicitations intended as inducements to sell or purchase real estate by reason of race, color, religion, national origin, ancestry, creed, handicap or sex. Such activity is known generally as "blockbusting" or "panic peddling."

Blockbusting and Panic Peddling Today in Illinois

26. To accomplish the unquestionably desirable purpose of preventing blockbusting and panic peddling, the General

Assembly directly prohibited those practices by enacting Subdivisions (a) through (c) of *Ill.Rev.Stat.* ch. 38, §70-51. These subdivisions forbid any person or corporation:

> (a) To solicit for sale, lease, listing or purchase any residential real estate within the State of Illinois, on the grounds of loss of value due to the present or prospective entry into the vicinity of the property involved of any person or persons of any particular race, color, religion, national origin, ancestry, creed, handicap, or sex.
>
> (b) To distribute or cause to be distributed, written material or statements designed to induce any owner of residential real estate in the State of Illinois to sell or lease his or her property because of any present or prospective changes in the race, color, religion, national origin, ancestry, creed, handicap, or sex, of residents in the vicinity of the property involved.
>
> (c) To intentionally create alarm, among residents of any community, by transmitting in any manner including a telephone call whether or not conversation thereby ensues, with a design to induce any owner of residential real estate in the State of Illinois to sell or lease his or her property because of any present or prospective entry into the vicinity of the property involved of any person or persons of any particular race, color, religion, national origin, ancestry, creed, handicap, or sex.

Plaintiffs do not challenge Subdivisions (a)-(c).

27. Federal law also directly prohibits blockbusting and panic peddling. 42 U.S.C. §3604(e).

28. Although allegations of blockbusting and panic peddling continue to circulate in Illinois, these allegations run far in excess of the actual incidence of such activities. (Ex.

6, ¶¶4-5.).[1] Plaintiffs have been able to locate only a single case in which an Illinois real estate broker[2] was charged with blockbusting or panic peddling under either state or federal law, and that broker was acquitted of this charge. (Ex. 9, ¶3; *compare* Exs. 3D (solicitation complaint; Count I), 3E (panic peddling complaint; Count II) *with* Ex. 3L, ¶2e (defendant convicted of Count I, acquitted of Count II).)

29. Consequently, legislation forbidding otherwise lawful real estate solicitation is unnecessary to prevent blockbusting and panic peddling because these practices rarely, if ever, occur in Illinois today. (Ex. 6, ¶5.) More importantly, even if there were a threat that such activities might occur in Illinois, they are directly prohibited by, and could be prosecuted under, state and federal laws other than *Ill.Rev.Stat.* ch. 38, §70-51(d).

Plaintiffs' Real Estate Brokerage Activities

30. The plaintiffs are engaged in the business of real estate brokerage. (Ex. 1, ¶2.) Plaintiffs' incomes are derived in part from commissions earned on the sale of property listed for sale through plaintiffs. Plaintiffs obtain listings to sell property largely through general advertising and solicitation activities which truthfully communicate to the public the nature of plaintiffs' services. (Ex. 1, ¶15; *see* Ex. 4, ¶¶3-4.) Thus *Ill.Rev.Stat.* ch. 38, §70-51(d) pro-

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[1] Plaintiffs incorporate as Exhibits to this Amended Complaint all exhibits submitted by them on March 10, 1989, as Plaintiffs' Submission To The Record. Plaintiffs cite their Submission to the Record as "Ex. ____."

[2] Plaintiffs use the term "brokers" to refer to all real estate professionals, including brokers, sales agents and other employees and independent contractors engaged in the business of real estate brokerage.

hibits and chills a key part of plaintiffs' efforts to obtain listings of property for sale.

31. Plaintiffs also offer cooperating brokerage services; *i.e.*, plaintiffs assist people wishing to purchase a home in finding a suitable property. Much of plaintiffs' homeseeking clientele, like plaintiffs, is black. (*See* Ex. 4, ¶10 (Black brokers tend generally to serve black homeseekers).) Plaintiffs' general advertising and solicitation activities are essential to plaintiffs' efforts to locate suitable housing opportunities for their homeseeking clientele. (Ex. 4, ¶¶10-12; Ex. 7, ¶7.) Thus *Ill.Rev.Stat.* ch. 38, §70-51(d) also prohibits and chills a key part of plaintiffs' efforts to locate suitable housing for their clientele.

32. Real estate brokers, including plaintiffs, offer a number of real estate services that do not involve selling or listing residential properties for sale. For example, some brokers offer appraisal services, mortgage brokerage services, commercial leasing and sales, and other real estate services that do not involve soliciting residential real estate sales or listings. (Ex. 4, ¶4.)

33. Plaintiffs, like other real estate brokers, employ a variety of advertising techniques to inform the public about themselves and their services. (*See*, *e.g.*, Ex. 1, ¶17; Exs. 1C-1U; Ex. 4, ¶¶3-4; Exs. 4B-4N.) Much of the advertising plaintiffs (and other brokers) employ does not seek to induce owners or occupants of residential properties to list or sell their properties. (*Id.*) Instead, brokers frequently advertise only their cooperating brokerage, mortgage brokerage, appraisal, or commercial leasing and sales services. (*Id.*) Brokers also distribute flyers and the like asking residents if they have already decided to sell their homes (*E.g.*, Ex. 2C; *see* Ex. 1, ¶6), and encouraging those who have decided to sell to contact the broker about his or her services. (*E.g.*, Exs. 4C, 4G, 4M.)

34. The advertising and solicitation described above is particularly important to black brokers and their clientele. Black brokers tend to be newer to the business than white brokers and therefore they often have less extensive contacts in the real estate market than white brokers. (Ex. 4, ¶¶9, 11.) Newer brokerage businesses, like newer businesses in most other industries, rely upon advertising to become known in the market and competitive with older, more established firms. (*See Id.*)

Efforts to Retard the Entry of Black Residents Into Predominantly White Communities—Integration Maintenance.

35. Community organizations seeking to resist "racial change" employ a variety of techniques to prevent blacks from purchasing homes in their predominantly white communities. For example, BAPA maintains the BAPA Housing Center. The BAPA Housing Center provides virtually all of the services provided by real estate brokers and competes vigorously with area brokers for local real estate business. The Housing Center has obtained a near monopoly on information about the availability of housing in the Beverly area by largely eliminating brokers from the sale of housing in Beverly. (*See* Ex. 5, ¶4 (BAPA persuades homeowners who participate in its integration maintenance program to withhold their properties from multiple listing services operated by brokers).) BAPA then is able to use its control over information about housing availability to maintain the racial status quo in the community by selectively disclosing this information to homeseekers according to the color of their skin. (*Id.*, ¶5.)

36. The BAPA Housing Center also maintains a list of "cooperating" or "preferred" brokers who have agreed to operate under certain guidelines intended to promote

BAPA's scheme for maintaining the current racial mix. These "cooperating" or "preferred" brokers refuse to do business in Beverly with any broker not designated by BAPA as a "cooperating" broker and are part of BAPA's scheme to create a closed real estate market in Beverly. (Ex. 1, ¶20.) BAPA has been so successful in this scheme that only a small fraction of the residences sold in Beverly are sold by or through any brokers other than BAPA's "cooperating" brokers. (Ex. 5, ¶4 (90-95% of Beverly homes are withheld from multiple listing services).)

37. Community organizations such as BAPA employ a number of other techniques in their coordinated effort to limit opportunity for black homeseekers to purchase housing in their communities. These organizations encourage homesellers who do list their properties with a broker to request that the listing not be published in any multiple listing service (Ex. 4, ¶8; Ex. 5, ¶4.) In addition, these organizations actively discourage the use of "For Sale" signs in residential real estate transactions. Finally, these organizations use anti-solicitation lists compiled pursuant to *Ill.Rev.Stat.* ch. 38, §70-51(d), as an integral part of their effort to close the real estate market in the community to blacks.

Anti-Solicitation Lists

38. The activities of BAPA illustrate the function of anti-solicitation lists compiled pursuant to *Ill.Rev.Stat.* ch. 38, 70-51(d), as part of a program to discourage blacks from moving into a predominantly white community.

39. BAPA actively encourages Beverly Area residents to place their names on its anti-solicitation list. This encouragement involves door-to-door and other in-person solicitation, including requests at public functions such as church services.

40. The office of the State's Attorney also actively encourages citizens to place their names on non-solicitation lists. The August-September 1985 issue of the State's Attorney News, contains what purports to be an interview with Assistant State's Attorney Sabbia about the "problem" of real-estate solicitation, and a checklist for the preparation of anti-solicitation lists. (Ex. 10A.)

41. Approximately three thousand five hundred (3500) Beverly area residents have signed affidavits designating BAPA their agent to notify real estate brokers that they do not desire to be solicited for the listing or sale of their real estate. On information and belief, many residents signed such affidavits only after representatives of BAPA solicited them to do so.

42. BAPA's anti-solicitation list (the "BAPA List," Ex. 10B) was arranged in a random fashion because this arrangement increases the burden of compliance and the risk of inadvertent violation of the Statute.

43. In another prosecution under the Statute, *People v. Century 21, Accent, et al.*, Rugai, former Director of Housing for BAPA, testified about her preparation of the BAPA List. A copy of portions of the transcript of this trial is included in the Record as Exhibit 10C. Rugai testified that the BAPA List was originally typed alphabetically but was later rearranged. Ex. 10C p. 67. The List was jumbled "to make it a little more difficult for people to solicit within our community," and "to make it harder for realtors to go through the list to find out who does not want to be solicited." *Id.* pp. 84-85.

44. On information and belief, the BAPA List was never updated to delete the names of persons who had moved, thereby precluding communication to new residents in Beverly. Rugai testified that the BAPA List, which pur-

ported to be effective until June 1, 1985, was prepared in the spring or summer of 1981, notwithstanding her personal knowledge that individuals on the List had moved. (Ex. 10C at 70, 73.)

45. Numerous other community organizations compile anti-solicitation lists similar to BAPA's. On information and belief, some of these organizations jumble their lists and deliberately fail to update them.

46. As part of its consent decree in this action, BAPA agreed to compile its anti-solicitation list in numerical order by street address and to update its list with additions and deletions on an annual basis. (Ex. 12, ¶¶12(a), 12(c), 12(d).) BAPA, however, is the only such community organization subject to the consent decree; there is nothing to prevent any other organization from maintaining its anti-solicitation list in such a deliberately confusing and uncertain form.

Plaintiffs' Alleged Solicitation

47. Century 21 Pearson & Baker was an Illinois corporation, owned by Pearson and Baker, which engaged in the business of real estate brokerage. Century 21 Pearson & Baker has been dissolved by the Illinois Secretary of State. Ex. D.

48. Because of the risk of mistakenly communicating with a homeowner on the BAPA List, and the severe penalties imposed therefor, Pearson has never made any calls or sent any mail, or advised any of his independent contractors to make calls or send mail, into Beverly. Pearson has instructed independent contractors who work with him, including those who reside in Beverly themselves, not to communicate with Beverly residents about the possible sale or listing of their homes.

49. Because of this policy, Century 21 Pearson & Baker had operated for over two years prior to the time Pearson was allegedly served with the BAPA List without receiving any complaints that any broker associated with Century 21 Pearson & Baker had communicated with anyone on the BAPA List.

50. On or about June 25, 1984, Brown signed an Independent Contractor Agreement with Century 21 Pearson & Baker. A copy of Brown's subsequent Independent Contractor Agreement, containing substantially the same terms as the original Agreement, is included in the Record as Exhibit 10E.

51. On or about that same date, Brown first began working from Century 21 Pearson & Baker's office. Pearson gave Brown a copy of a reverse directory of addresses on South Winchester Street in Chicago. Ex. 10F. A reverse directory contains the same information as a telephone directory, but lists residents' names and telephone numbers in the numerical order of their addresses.

52. Pearson instructed Brown to make telephone calls to individuals in the Damen area. Pearson told Brown to ask the individuals whether they were considering moving in the next two years. If they answered yes, he was to note their name and number for later communication. If they answered no, he was to ask them if they knew anyone else who might be interested in selling or buying a home. Brown did not ask anyone to list or sell his or her house. The letters of Eiben and Fahrer to BAPA, copies of which were given to the State's Attorney by BAPA, confirm that this was the substance of Brown's telephone calls. Exs. 10G and 10H.

53. Pearson did not advise Brown of the existence of the BAPA List, of which Pearson was aware, because

Pearson had directed Brown to make telephone calls only to individuals in the Damen area and not to make calls to *anyone* in Beverly.

54. Brown made telephone calls to the individuals on the reverse directory, beginning at 7820 South Winchester. These calls took place over two or three days. Because Brown was unfamiliar with the neighborhood, he did not know that the Damen area ends at 90th Street and the Beverly area begins at 91st Street.

55. On or about June 27 or 28, 1984, Brown made his first telephone call to the Beverly neighborhood.

56. In the early evening of June 28, 1984, Brown telephoned a few individuals who claimed to be on the BAPA List. These individuals expressed displeasure at Brown's having called them. Since Brown was unaware of the BAPA List or its significance, he did not understand these complaints.

BAPA's "Investigation"

57. According to the State's Attorney's own Investigations Bureau Report (Ex. 10I), on or about June 27 or June 28, 1984, Eiben, William McGlynn ("McGlynn") and John Meany ("Meany") called Girsch, BAPA's Economic Development Coordinator, and advised her that they had been solicited by Brown. Ex. 10I. Meany's name was not on the BAPA List allegedly given to Pearson. *Id.*

58. On or about June 28 or 29, 1984, Girsch called Brown about his alleged solicitation. At this time, Brown was still unaware of the BAPA List and told Girsch he would telephone whomever he wished.

59. On or about July 23, 1984, Girsch and Costello, the Director of BAPA's Housing Center, met with Pearson

and Brown. Girsch and Costello told Pearson that they had warned Brown about his telephone calls and that Brown had telephoned Meany again subsequent to their warning. Girsch and Costello indicated that they were upset about Brown's having called Meany even though Meany was not on the BAPA List allegedly served on Pearson. Girsch and Costello made it clear that BAPA regarded *any* calls to *any* resident of Beverly, whether or not on the List, with disfavor.

60. Pearson and Brown explained to Girsch and Costello how Brown erroneously made the calls to Beverly residents, apologized for the mistake, and assured them that it would not happen again. Girsch and Costello expressed their satisfaction with this explanation and departed.

The State's Attorney's Investigation

61. On information and belief, some time prior to January 1985, agents of BAPA contacted the State's Attorney's Office and asked that a prosecution of plaintiffs be initiated.

62. On or about January 8 and 16, 1985, Kopeikin and Merrick, Investigators for the State's Attorney's Office, interviewed Girsch and Costello. The substance of this interview was memorialized by Kopeikin and Merrick in Exhibit 10I.

63. On or about January 28, 1985, Kopeikin interviewed Pearson and Brown. The substance of this interview was memorialized by Kopeikin in Exhibit 10J. Kopeikin did not inform Pearson and Brown that the State's Attorney's Office was considering prosecution and did not advise them of their constitutional rights. Pearson informed Kopeikin that he did not recall seeing or signing the BAPA List

but that if he had he would not have paid attention to it because he did not solicit in Beverly.

64. Pearson told Kopeikin that Brown had only been on the job a few days, explained how the mistake occurred, and gave Kopeikin a copy of a reverse directory (Exhibit 10J) to show him how Brown accidentally made the calls in Beverly. Kopeikin assured Pearson and Brown that based on what they had told him, there appeared to be no problem.

The Prosecutions of Plaintiffs For Alleged Solicitations

65. Notwithstanding its investigation, on October 31 and November 4, 1985, over sixteen months after the alleged solicitations and over ten months after conducting its investigation, the State's Attorney filed criminal complaints against Century 21 Pearson, Century 21 Pearson & Baker, Pearson, Brown and Harold T. Baker, alleging they all "knowingly" solicited individuals on the BAPA List. (Ex. 1, ¶12; Ex. 1B.)

66. The criminal complaints against Century 21 Pearson, Century 21 Pearson & Baker, Pearson and Brown were disposed of pursuant to *Ill.Rev.Stat.* ch. 38, §1005-6-1(c). (Ex. 1, ¶14.) Under that procedure, the accuseds stipulated to facts supporting the charges against them without admitting guilt, and the court imposed a period of non-reporting supervision and a fine of $100.00 in each case. (*Id.*) After they successfully completed their supervision, the court discharged the complaint against each accused in July 1988. (*Id.*) No plaintiff in this action is currently subject to any criminal proceedings or supervision under *Ill.Rev.Stat.* ch. 38, §70-51(d).

BAPA's Harassment of Pearson

67. Pearson is currently a member of the National Association of Realtors® ' Equal Opportunity Committee and is District Five Vice President of the Illinois Association of Realtors® . He is a past President of the Greater South Suburban Board of Realtors® . He was a member of the Greater South Suburban Board of Realtors® ' Equal Opportunity Committee for nine years and its Chairman for five years. He was also Chairman of the Illinois Association of Realtors® ' Equal Opportunity Committee in 1983 and 1984.

68. Various representatives of BAPA have harassed Pearson since he moved his office from an inconspicuous location to a highly visible location on the edge of Beverly on or about May 1, 1985.

69. This harassment is directed against Pearson because he, like the other individual plaintiffs, is black, and most of his clientele is black. BAPA sees the presence of a black real estate office on its edge as a threat to its program to maintain the racial status quo in Beverly.

70. Individuals purporting to be representatives of BAPA have called Pearson's landlord and expressed displeasure at the presence of a black real estate broker on the edge of Beverly.

71. An individual purporting to be a representative of BAPA confronted Pearson about advertising flyers which had blown into the Beverly area from an adjoining neighborhood and warned Pearson not to solicit anyone in Beverly.

72. The State's Attorney did not initiate the prosecutions against plaintiffs until after Pearson moved his office to its new location. On information and belief, this was the result of pressure by BAPA and is part of BAPA's

plan to assure that no brokers other than "approved" brokers sell homes in Beverly.

Harassment of Pearson by Unknown Individuals

73. Pearson has also been subjected to harassment by unknown individuals since he moved his office. Approximately one month after Pearson moved his office to its new location, its front window was broken.

74. City of Chicago Police officials issued numerous parking tickets to individuals parked in unmetered spaces at the side of Pearson's office and attempted to block the spaces off although they were legal parking spaces on a street that was not within their jurisdiction.

75. The weekend after a report appeared in *The Beverly Review* listing Century 21 Pearson has a defendant in the anti-solicitation prosecutions, shots were fired through the window of Pearson's office. Shots have been fired through the window of Pearson's office on subsequent occasions.

Other Prosecutions for "Solicitation" or "Advertising"

76. As alleged in paragraphs 47-66, Pearson, Brown and Century 21/Pearson were prosecuted under the Statute even though they never "solicited" anyone. Other real estate professionals have also been prosecuted for merely distributing informational or goodwill advertising that was not intended to induce anyone to sell or list his property.

77. In 1987, Pontarelli Realty and Management Co. and Joseph Z. Gajda were prosecuted for distributing a flyer that listed the addresses of local residents whom the Pontarelli firm had recently helped relocate and continued: "We want you to stay. However, should the need arise,

we want you to know that we will handle *your* affairs professionally and with care." A copy of this flyer is submitted as Exhibit 8A. At trial, Pontarelli and Gajda urged the jury, *inter alia*, to conclude that this flyer was not a solicitation. (Ex. 8, ¶4.) The jury acquitted both Pontarelli and Gajda. (*Id.*)

78. Red Carpet Beaulieu, Inc. Realtors® was also prosecuted under the Statute for distributing general advertising. There the Beaulieu firm distributed a flyer providing an "Energy Cost Cutting Tip" advising residents how to weather strip and caulk their homes to save heating costs. The flyer also offered residents the opportunity to request information about the firm's services. A copy of this flyer is submitted as Exhibit 8B. The Honorable Stuart A. Nudelman held that this flyer was not a solicitation and dismissed all counts of the complaint brought upon its distribution. (Ex. 8, ¶¶5, 6.)

79. In the same case, the defendants also were prosecuted for distributing a recipe for cooking Thanksgiving turkey stuffing. A copy of this recipe is submitted as Exhibit 8C. Judge Nudelman also dismissed all counts based upon this recipe on the ground that it was not a "solicitation." (Ex. 8, ¶7.)

80. Exhibits 3I and 3K are further examples, drawn from the files of the State's Attorney's Office, of advertisements which triggered prosecutions under the Statute. Each of these advertisements merely urges homeowners who are *already* thinking of selling to contact the sender for information about his services.

81. These examples of recent prosecutions under the Statute demonstrate that the Statute's failure to define "solicitation" often results in the prosecution of advertisements that do not seek to induce anyone to sell or list who is not already planning to move.

82. On information and belief, many of the prosecutions that occur under the Statute result from pressure by community organizations, such as BAPA, upon the State's Attorney's office.

Normal Real Estate Practices Do Not Cause Rapid Racial Change

83. Blockbusting and panic peddling are practices designed to cause rapid racial change. Rapid racial change, however, is not taking place today in any areas of Illinois. And even if such change were taking place, normal real estate practices, such as solicitation, advertising and the use of "For Sale" signs, are not causes of such change. (Ex. 6, ¶3.) Instead, these practices are but "symptoms" of the interaction of supply and demand in the housing market. (*Id.*) Conditions in housing markets which stimulate such activity by brokers and homesellers result from many causes other than racial change. (*Id.*) Thus the public perception, created by community organizations such as BAPA, that real estate brokers and mortgage lenders "cause" rapid racial change by soliciting and using "For Sale" signs, is inaccurate. (*Id.*)

The Statute's Harmful Effects on the Real Estate Market

84. In addition to its harmful effects on the plaintiffs and other real estate professionals, the Statute harms the real estate market and the home buyers and sellers who comprise it by restricting their access to information about the market. First, a home is a unique commodity, and the Statute interferes with its proper valuation by disrupting the free flow of information needed to make valid comparisons between competing properties. (See Ex. 7,

¶8.) Second, the Statute's interference with access to current information about the market causes volatility and inefficiency in the market. (*Id.*) Third, the Statute forbids brokers to educate homeowners about the potential benefits of selling their homes; this prohibition in turn reduces the number of homeowners willing to sell and thus supply of available homes. (*See id.*) Finally, the Statute forces home buyers and sellers to make what is probably the most substantial financial transaction of their lives with less than all the pertinent information available to them. (*Id.*)

First Amendment Violation

85. The livelihoods of plaintiffs and other real estate professionals depend upon their right to advertise truthful, nondeceptive information about the local real estate market, the nature of their services, themselves and their company. (Ex. 1, ¶15.) The Statute directly prohibits real estate professionals from soliciting listings from residents who notify them that they do not wish to be solicited. The Statute's failure to define the term "solicit," and the draconian penalty—revocation of the broker's real estate license—imposed even for an inadvertent first time violation, also directly inhibits the exercise of real estate professionals' rights to communicate with prospective clients without "solicitating" them as that term commonly is understood. (Ex. 1, ¶¶17-19; Ex. 4, ¶6.)

86. Furthermore, the Statute, when combined with the efforts of community organizations to complicate brokers' compliance with the Statute by, among other things, scrambling their notification lists and deliberately allowing them to become out of date, restricts the right of plaintiffs and other brokers to communicate with residents who have

never notified any broker that they do not wish to receive solicitations. (Ex. 1, ¶16.)

87. Finally, the economics of the advertising industry interact with the Statute to preclude real estate professionals from communicating with receptive residents because mass and bulk mailers cannot feasibly "target" their mailings to those residents in a community who have not placed their names on an anti-solicitation list. (Ex. 4, ¶12.)

88. Were it not for the Statute, then, plaintiffs and other brokers would exercise their First Amendment right to communicate truthful, nondeceptive information, both solicitation and general advertising, to many residents whom the Statute now prevents them from reaching with this information. (Ex. 1, ¶¶15-16.)

89. Defendants have no substantial or legitimate interest in enforcing the Statute and thereby restraining truthful speech concerning the otherwise lawful attempt to induce residents to sell or list their homes for sale.

90. The Statute fails to directly advance any legitimate interest the State may have in regulating real estate advertising or solicitation.

91. The Statute is far more restrictive than is necessary to achieve any legitimate interest the defendants might have in regulating real estate advertising or solicitation.

COUNT II: VIOLATION OF DUE PROCESS

92. Plaintiffs reallege and incorporate herein paragraphs 1 through 91 of their Complaint.

93. The Statute also chills plaintiffs' exercise of their First Amendment freedoms because the Statute contains no definition of "solicit" or "solicitation". Therefore an

ordinary person does not have fair notice of what activities are proscribed.

94. Neither brokers, their attorneys, nor even prosecutors and investigators have a clear idea what the Statute prohibits under the term "solicit." Because plaintiffs, and other real estate brokers, are forced to guess at the meaning of "solicit" under the Statute, they therefore have refrained and are refraining from soliciting and advertising their services to avoid the costs and risks of prosecution.

95. Plaintiffs' rights to due process are infringed by the vague terms of the Statute, which compel plaintiffs to guess at their own risk what conduct is and is not "solicitation."

COUNT III: VIOLATION OF EQUAL PROTECTION

96. Plaintiffs reallege and incorporate herein paragraphs 1 through 91 and 93 through 95 of their Complaint.

97. The Statute prohibits telephone, direct mail or written solicitations only if they pertain to the sale or listing of residences for sale. All other kinds of truthful and accurate telephone, direct mail and written solicitation or advertising are permitted.

98. By singling out this one type of communication, the Statute creates a content-based classification which infringes the fundamental right of freedom of speech.

99. This classification affects only real estate brokers and leaves all other advertisers, direct-mail salesmen and other businessmen free to exercise their right to engage in truthful commercial speech. The advertising materials distributed by the real estate industry are no more intrusive upon residential privacy than any other type of advertising material.

100. Defendants have no substantial or legitimate interest in, nor any rational basis for, creating such a classification and depriving real estate brokers of their valuable right to engage in truthful advertising.

101. This classification is not finely tailored to, substantially related to, or even rationally related to any legitimate interest defendants might have. The Statute therefore violates plaintiffs' right to Equal Protection.

WHEREFORE, plaintiffs request that this Court:

1. Declare the Statute unconstitutional on its face and as applied to solicitation and advertisements by real estate brokers.

2. Enjoin the enforcement of the Statute.

3. Award plaintiffs the costs and expenses incurred in the litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. §1988; and

4. Award plaintiffs such other and further relief as this Court may deem just and equitable.

Respectfully submitted,

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STATUTE INVOLVED

Ill. Rev. Stat. ch. 38, ¶70-51 provides:

§1. Inducements to sell or purchase by reason of race, color, religion, national origin, ancestry, creed, handicap, or sex—Prohibition of Solicitation. It shall be unlawful for any person or corporation knowingly:

(a) To solicit for sale, lease, listing or purchase any residential real estate within the State of Illinois, on the grounds of loss of value due to the present or prospective entry into the vicinity of the property involved of any person or persons of any particular race, color, religion, national origin, ancestry, creed, handicap, or sex.

(b) To distribute or cause to be distributed, written material or statements designed to induce any owner of residential real estate in the State of Illinois to sell or lease his or her property because of any present or prospective changes in the race, color, religion, national origin, ancestry, creed, handicap, or sex, of residents in the vicinity of the property involved.

(c) To intentionally create alarm, among residents of any community, by transmitting in any manner including a telephone call whether or not conversation thereby ensues, with a design to induce any owner of residential real estate in the State of Illinois to sell or lease his or her property because of any present or prospective entry into the vicinity of the property involved of any person or persons of any particular race, color, religion, national origin, ancestry, creed, handicap, or sex.

(d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property. For the purpose of this subsection, notice must be provided as follows:

(1) The notice may be given by the owner personally or by a third party in the owner's name, either in the form of an individual notice or a list, provided it complies with this subsection.

(2) Such notice shall be explicit as to whether each owner on the notice seeks to avoid both solicitation for listing and sale, or only for listing, or only for sale, as well as the period of time for which any avoidance is desired. The notice shall be dated and either of the following shall apply: (A) each owner shall have signed the notice or (B) the person or entity preparing the notice shall provide an accompanying affidavit to the effect that all the names on the notice are, in fact, genuine as to the identity of the persons listed and that such persons have requested not to be solicited as indicated.

(3) The individual notice, or notice in the form of a list with the accompanying affidavit, shall be served personally or by certified or registered mail, return receipt requested.

(3)

Supreme Court, U.S.
FILED
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No. 91-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois Corporation,

Petitioners,

v.

JAMES EDGAR, as Governor of the State of Illinois, and ROLAND W. BURRIS, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. May Illinois forbid real estate brokers and others who solicit householders for home sales and listings to solicit those householders who have affirmatively given notice that they do not want to be solicited?

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No. 91-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois Corporation,

Petitioners,

v.

JAMES EDGAR, as Governor of the State of Illinois, and ROLAND W. BURRIS, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Illinois' Anti-Solicitation Statute

Section 1(d) of "An ACT to prohibit the solicitation or inducement of sale or purchase of real estate on the basis of race, color, religion * * *" (Ill. Rev. Stat. 1991, ch. 38, ¶70-51(d) ("Paragraph 70-51(d)")) permits householders to insulate themselves from solicitations for the sale or list-

ing of their homes. Paragraph 70-51(d) prohibits a person or corporation from "solicit[ing] any owner of residential property to sell or list such residential property" after the solicitor has received notice that the owner does not desire to sell the property. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(d). Specific requirements for the form and service of the notice are included in the statute. *Id.*

Paragraph 70-51(d) is found in a criminal statute aimed at preventing discriminatory real estate practices. Ill. Rev. Stat. 1991, ch. 38, par. 70-51. Subsection (a) of the statute prohibits soliciting for the sale, lease, listing or purchase of residential real estate on the basis of a loss in value of the real estate as a result of minority or other undesired individuals entering the neighborhood. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(a). Subsection (b) prohibits the distribution of written material intended to induce residential property owners to sell or list their property for sale for similar discriminatory reasons. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(b). Subsection (c) prohibits communicating to residents in a manner designed to create alarm on a discriminatory basis, and thereby induce the sale or listing of residential real estate. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(c). Paragraph 70-51(d) adds to the above prohibitions by giving the homeowner the authority to cut off unwanted solicitations for the sale or listing of his property by asserting his right to residential privacy.

Illinois courts have reviewed Paragraph 70-51(d) twice. In 1977, the Illinois Supreme Court held that Paragraph 70-51(d) was not an unconstitutional restriction on commercial speech because of the interest in residential privacy. *People v. C. Betts Realtors, Inc.*, 66 Ill. 2d 144, 149-51, 361 N.E.2d 581, 584 (1977). The court relied heavily on *Rowan v. United States Post Office*, 397 U.S. 728

(1970). Later, the Illinois Appellate Court interpreted the term "solicit" to mean a petition "addressed to a particular individual to do a particular thing," thus distinguishing it from mass media advertising. *People v. Beaulieu Realtors, Inc.*, 144 Ill. App. 3d 580, 585, 494 N.E.2d 504, 508 (1st Dist. 1986).

Prosecutions under Paragraph 70-51(d) are limited to prosecutions of in-home solicitations. Petitioners here were prosecuted as a result of telephonic in-home solicitations. (R-80, ex. 1 at ¶7.)[1] The prosecution in *Beaulieu Realtors* was brought about as a result of flyers mailed directly to the homes of individuals who had given notice pursuant to Paragraph 70-51(d). 144 Ill. App. 3d at 585, 494 N.E.2d at 508.

Notwithstanding petitioners' statement that "good will" advertising really "does not seek to induce residents to list or sell their properties" (Petition For Writ Of Certiorari at 3-4), petitioners' examples of such advertising contain statements that could reasonably be construed as solicitations for the sale or listing of homes. (R-80, exs. 1r, 2c, 4b.) Moreover, householders could easily and reasonably interpret advertisements for open houses (R-80, exs. 1d-1f), or brochures asking if residents have already decided to sell their homes (R-80, ex. 2c), or notices "encouraging those who have decided to sell to contact the broker[ ] (*E.g.*, [R-80], exs. 4c, 4g, 4m)" as solicitations to obtain more home listings. Petition For Writ Of Certiorari at 4. Even the brochures with Thanksgiving turkey recipes and weatherstripping tips contained tear-off cards to return to the broker for those who were "considering a move." (R-80, exs. 8b, 8c.) Any concerns over the proper inter-

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[1] Respondents, as petitioners do, cite the record below as "R-____."

pretation of these advertisements are easily resolved under the Seventh Circuit's proscription that the addressees' "names must be removed from any mailing list the broker may have, and the broker must refrain from future communications to the named addressees." *Curtis v. Thompson*, 840 F.2d 1291, 1304 n.12 (7th Cir. 1988) ("*Curtis*").

Respondents submitted evidence that statutes such as Paragraph 70-51(d) are still a vital means of combatting unethical real estate practices such as blockbusting and panic peddling. (R-78, at ¶¶17-21.) Solicitation is a method used by unethical realtors to encourage block-by-block resegregation. (*Id.*, at ¶¶14, 19-20.)

Proceedings Below

Along with their complaint, petitioners filed a motion for preliminary injunction. (R-9.) The District Court denied the motion because petitioners would not succeed on the merits. (App. p. 49.)[2] The Seventh Circuit affirmed the District Court in a divided decision. *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). The majority opinion found that petitioners' complaint was insufficient as a matter of law. Judges Coffey and Eschbach agreed that

> the district court properly denied plaintiff's motion for a preliminary injunction based upon her failure to establish a reasonable likelihood of prevailing on the merits. Curtis' First Amendment right to engage in commercial speech is properly limited by the state's legitimate interest in ensuring the privacy of its citizens, an interest which is narrowly served by prohibiting the solicitation of residential property owners once they have expressed their desire to be left alone.

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[2] Respondents cite to petitioners' appendix as "App. p. ____."

840 F.2d at 1305. Judge Eschbach wrote separately to state that he found the holding in *Rowan v. United States Post Office*, 397 U.S. 728 (1970), "relevant" and "helpful," but not "dispositive." *Id.* Judge Ripple dissented because he felt that further development of the record was needed. *Id.* at 1306.

After remand, the District Court dismissed the complaint. (App. p. 9.) The Seventh Circuit again affirmed. It held that its earlier decision in *Curtis*, that plaintiff's complaint was insufficient as a matter of law, was the law of the case. (App. pp. 2-4.) Yet, the court did not ignore petitioners' substantive claims. The Seventh Circuit noted that the holdings in *Curtis* had been recently confirmed in *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 971 (1992) ("*South Suburban*", or collectively with *Curtis* "the Seventh Circuit decisions").

South Suburban is important to an understanding of this case. *South Suburban* involved a look at several facets of real estate marketing, including an analysis of anti-solicitation ordinances of several Illinois municipalities similar to Paragraph 70-51(d). The issues decided in *Curtis* were raised again in *South Suburban*, and *Curtis* was resoundingly affirmed in a unanimous decision:

> The Realtors' challenge to the constitutionality of the municipal non-solicitation ordinances appears to recognize that our opinion in *Curtis* conflicts with their contentions but requests a re-evaluation and reversal of the *Curtis* decision. This we decline to do.

935 F.2d at 890. In *South Suburban*, the Seventh Circuit relied on *Curtis* to find the privacy interest a valid means of restricting commercial real estate activities. The court also rejected vagueness and equal protection challenges to the anti-solicitation ordinances. *Id.* at 891-96.

REASONS FOR DENYING THE WRIT

Petitioners argue that Paragraph 70-51(d) is constitutionally infirm because it effectively strips away their commercial speech right to advertise their real estate business. In contrast to petitioners' assertions, the rulings of the Seventh Circuit are fully in tune with constitutional dictates for commercial speech. The Seventh Circuit decision in *Curtis*, which was re-examined issue by issue and expressly reaffirmed in *South Suburban*, holds that the substantial government interest in protecting residential privacy takes precedence over petitioners' right to promote their commercial activities. The Seventh Circuit decisions limit petitioners' right to contact only those householders who have affirmatively indicated that they do not want petitioners' material.

I.

"WHEN THE FUNDAMENTAL RIGHT TO PRIVACY CLASHES WITH THE RIGHT TO FREE EXPRESSION, THE INTEREST IN PRIVACY DOES NOT PLAY SECOND FIDDLE WHEN THE SPEECH IS MERELY INTENDED TO PROPOSE A COMMERCIAL TRANSACTION." *CURTIS v. THOMPSON.*

In their first argument, petitioners propose further review of this case for three reasons: (1) the Seventh Circuit decisions conflict with *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, ____ U.S. ____, 112 S. Ct. 1290 (1992); (2) Paragraph 70-51(d) is unconstitutionally vague because it does not inform realtors as to what material they are prohibited from sending to unreceptive homeowners; and (3) the purpose of the statute is really to promote racial segregation.

These concerns were properly laid to rest by the Seventh Circuit, and this case is inappropriate for further review.

A. The Decisions In *Curtis* And *South Suburban* Do Not Conflict With The Sixth Circuit's Decision In *Discovery Network* Because The Seventh Circuit Decisions Rely On The Privacy Interest To Regulate Realtors' Advertising.

Contrary to petitioners' assertion, the decisions in *Curtis* and *South Suburban* are easily reconciled with the Sixth Circuit's decision in *Discovery Network*. The Seventh Circuit decisions and *Discovery Network* involve two distinctly different situations, evident from the very first sentence in *Discovery Network*: "The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills *on public property*." 946 F.2d at 465 (emphasis added). *Discovery Network* measures the right to commercial speech against a city ordinance limiting the distribution of commercial handbills from newsracks placed on public property. *Id.* In contrast, the anti-solicitation laws in *Curtis* and *South Suburban* balance the right to advertise one's business against the right of the homeowner to residential privacy. The presence of the privacy interest makes the two situations radically different and distinguishable under the First Amendment.

Illinois' strong interest in protecting residential privacy permits it to limit speech, particularly when the limitation is imposed on commercial speech. As the Seventh Circuit reasoned in *Curtis*: "[T]he state's interest in regulating expressive conduct is even greater where the expressive conduct threatens to (or does) impinge on the exercise of equally important constitutional rights (e.g., privacy) of others." 840 F.2d at 1300 n.8. The Seventh

Circuit then succinctly concluded: "When the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Id.* at 1300 (footnote omitted).

This strong support for the interest in residential privacy is readily seen in this Court's jurisprudence. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that the interest in preserving residential privacy is sufficient to uphold a complete ban on picketing—a "core" type of First Amendment speech—because "[t]here simply is no right to force speech into the home of an unwilling listener"); *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970) (holding that a regulation permitting a householder to insulate himself from material that the householder found "erotically arousing or sexually provocative" is valid because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer"). In *Rowan*, this Court balanced "the right of every person 'to be let alone' * * * in the scales with the right of others to communicate" and found that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37.

Relying on the principles embodied in these cases, the Seventh Circuit held that Paragraph 70-51(d) was a valid limitation on petitioners' commercial speech rights. *Curtis*, 840 F.2d at 1300-04; *see also South Suburban*, 935 F.2d at 890-94. There is no conflict between the Sixth and Seventh Circuit Courts of Appeals.

B. Illinois' Anti-Solicitation Statute Gives Realtors Clear Direction On How To Comply—Remove The Addressee's Name From Their Mailing List.

Petitioners also challenge the Illinois statute on vagueness grounds. However, there is no risk of error if the broker simply removes the addressee's name from his or her mailing list. *Curtis*, 840 F.2d at 1304 n.12; *see also Rowan*, 397 U.S. at 740.

South Suburban directly answers petitioners' challenge here. The *South Suburban* decision reviewed the vagueness analysis in *Curtis* and agreed that Paragraph 70-51(d) met due process requirements. The Seventh Circuit rejected claims that a theoretical overlap into such things as "an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office," made the statute invalid on vagueness grounds. 935 F.2d at 894-95 & n.19.

Petitioners suggest that the Cook County State's Attorney's Office frequently prosecutes real estate professionals for "general goodwill and other advertising that does not attempt to induce anyone to sell or list property." Petition For Writ Of Certiorari at 14. Contrary to petitioners' suggestion, this "general goodwill advertising" includes language which could reasonably be construed as solicitations for home sales. (*See e.g.*, R-80, exs. 1r, 2c, 4b, 8a, 8b.) Thus, petitioners' complaint that Paragraph 70-51(d) produces standardless prosecutions lacks merit.

C. Contrary To Petitioners' Assertions, The Purposes Of The Illinois Anti-Solicitation Statute Are To Protect Against Unethical Real Estate Practices Such As Blockbusting, And In Recent Times, To Protect The Interest In Residential Privacy.

Petitioners repeatedly argue that the Illinois General Assembly intended Paragraph 70-51(d) to foster racial segregation; to "single out a discrete group of speakers" for discriminatory treatment because these speakers "assist black homeseekers to find housing in predominantly white communities." Petition For Writ Of Certiorari at 12. Contrary to petitioners' assertions, Paragraph 70-51(d) was never intended to discriminate against black homeseekers. Paragraph 70-51(d) was enacted to combat unethical real estate activities such as blockbusting. *People v. C. Betts Realtors, Inc.*, 66 Ill. 2d 144, 149, 361 N.E.2d 581, 583-84 (1977); *People v. Beaulieu Realtors, Inc.*, 144 Ill. App. 3d 580, 586, 494 N.E.2d 504, 509 (1st Dist. 1986). The court in *Curtis* recognized that the statute currently served this important interest in privacy:

> In this case, the narrowness of the statute is the result of its attempt to achieve its primary purpose of preventing blockbusting. But the privacy interests now directly and narrowly served by § 70-51(d) operate to justify the very limited infringement upon the First Amendment rights of sellers of real estate.

840 F.2d at 1303 n.10. Paragraph 70-51(d) serves important state interests of preventing unethical real estate practices such as blockbusting and protecting residential privacy.

II.

THE ILLINOIS ANTI-SOLICITATION STATUTE MEETS ALL OF THE *CENTRAL HUDSON* REQUIREMENTS FOR REGULATING COMMERCIAL SPEECH.

Petitioners challenge the privacy interest as a valid purpose for regulating commercial real estate advertising. The Seventh Circuit decisions correctly found that Paragraph 70-51(d) satisfied the requirements for regulating commercial speech as laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and its progeny. Paragraph 70-51(d) is a valid regulation of commercial real estate advertising.

Petitioners attempt to deny the vitality of Paragraph 70-51(d) by arguing that it was not the original intention of the lawmakers to protect the privacy interest. Yet, even the dissent in *Curtis* acknowledged that

> [t]he majority correctly notes that the government may assert in defense of the statute an interest other than that which prompted the original enactment of the statute. *See Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 71, 103 S. Ct. 2875, 2883, 77 L. Ed. 2d 469 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 1921, 56 L. Ed. 2d 444 (1978); *Doe v. Bolton*, 410 U.S. 179, 190-91, 93 S. Ct. 739, 746-47, 35 L. Ed. 2d 201 (1973).

840 F.2d at 1307 (Ripple, J., dissenting).

Paragraph 70-51(d) also meets the other requirements of the *Central Hudson* test. *See* 447 U.S. at 566. The regulation directly advances the interest in protecting residential privacy:

> [T]he regulation in issue meets the *Central Hudson* test because it directly advances the goal of ensuring privacy in the home. As was the case in *Rowan*, once a homeowner expresses his or her desire not

> to receive certain types of literature he or she determines to be objectionable, there simply is no further right to press those ideas on the unwilling recipient.

Curtis, 840 F.2d at 1302 (footnote omitted). The statute is also narrowly tailored to achieve the goal of protecting residential privacy. Since "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," (*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)), the prohibition on solicitations to those who have given notice that they do not wish to be solicited fittingly serves the privacy interest.

The unanimous panel in *South Suburban* rejected petitioners' suggestion that the privacy interest may not be used to insulate homeowners from only one category of commercial speech: "Regardless of whether a single mailer or an entire class of mailers are involved, 'a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.' " 935 F.2d at 894 (quoting *Rowan*, 397 U.S. at 736-37).

A valid regulation promoting the interest in privacy protects "the right of every person 'to be let alone' " and shields the "unreceptive addressee" from "unwanted communication, whatever its merit." *Rowan*, 397 U.S. at 736, 737. "Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby*, 487 U.S. at 485 (citations omitted). Whether the speech is commercial speech with its "qualified, but nonetheless substantial protection" (*Bolger*, 463 U.S. at 68), or "core" First Amendment speech subject to "careful scrutiny" (*Frisby*, 487 U.S. at 479), the privacy interest,

and more particularly the interest in residential privacy, is amply sufficient to sustain a ban on speech. *See Frisby, supra,* 487 U.S. 474 (1988); *National Funeral Services, Inc. v. Rockefeller,* 870 F.2d 136 (4th Cir. 1989) (holding that a West Virginia statute which bans in-person and telephonic solicitations for preneed funeral contracts to prospective purchasers in nursing homes, hospitals and private residences, as well as to relatives of persons near death, is a valid regulation based, in part, on the interest in residential privacy).

III.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED WHERE THE SEVENTH CIRCUIT HELD THAT PETITIONERS' CLAIMS WERE INSUFFICIENT AS A MATTER OF LAW.

Petitioners finally request an order reversing the decisions of the lower courts in this case so that they may obtain a trial on the merits of their claims. But they are not entitled to a trial. In *Curtis,* the Seventh Circuit found that petitioners' complaint was insufficient as a matter of law. 840 F.2d at 1296-97. The court expressly recounted this holding in its second decision in this case, *Pearson v. Thompson.* (App. pp. 2-4.) On the second review, it became petitioners' burden to prove that *Curtis* should not be the law of the case. They did not meet their burden of proof and the Seventh Circuit affirmed the dismissal of the complaint. (App. p. 4.)

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I.

THE STATE, SUPPORTED BY THE COURTS BELOW, SILENCES FAR MORE SPEECH THAN THE ILLINOIS LEGISLATURE ACTUALLY PROHIBITED.

The Court should grant this Petition because the decision below would deprive commercial speakers of due process protection by shifting to speakers the onus of resolving statutory vagueness by ceasing all future communication, rather than just that speech which the legislature actually prohibited.

The Illinois General Assembly imposed severe criminal penalties only on brokers who "solicit residents to list or sell" their homes after notice to the brokers. *Ill. Rev. Stat.* ch. 38, ¶70-51(d) (the "Anti-solicitation law" or the "Statute"). Lacking clear statutory definition of the prohibited conduct, however, prosecutors have charged violations against brokers whose goodwill advertising made no effort to persuade or induce residents to list or sell. (*See, e.g.*, R-80, Exs. 8b, 8c.) Even when state judges dismissed those prosecutions because the advertising in question was not "solicitation" (*id.*, Ex. 8 at ¶¶5-7), the State contends in its Opposition Brief that such advertising "reasonably could be construed as solicitations for the sale or listing of homes." (Opp. Br.[1] at 3-4, 9.) The State thus asserts a policy of "nonacquiescence" under which it may prosecute a broker for virtually any communication with

[1] Petitioners cite their Petition For Writ Of Certiorari as "Pet. at ____," and Respondents' Brief in Opposition as "Opp. Br. at ____."

residents, including advertisements previously ruled outside the scope of the Anti-solicitation law by a state judge. If brokers find this situation uncertain, the State says, they may resolve "any concerns" by "refrain[ing] from future communications to the named addressees." (*Id.* at 3-4, 8, citing *Curtis v. Thompson*, 840 F.2d 1291, 1304 n.12 (7th Cir. 1988).)

The Illinois legislature, however, did not forbid *all* "future communication" between brokers and residents. Hence the Statute provides no warning to brokers, for example, that they may be imprisoned for distributing goodwill advertising or for advertising a house that *already* is for sale. Moreover, the Court of Appeals' attempt to "cure" this defect by judicially expanding the Statute's reach further conflicts with this Court's due process jurisprudence. *E.g.*, *Pierce v. United States*, 314 U.S. 306, 311 (1941).

II.

NEITHER INTEREST ASSERTED BY THE STATE JUSTIFIES SILENCING PETITIONERS' SPEECH.

The State's First Amendment defense simultaneously invokes two interests—prevention of "unethical real estate practices" and protection of residential privacy—not because both support the Anti-solicitation law, but because neither does so. The Court should grant this Petition because the illusory justifications proffered by the State and embraced by the courts below would permit government to silence any disfavored group of speakers.

A. The Anti-Solicitation Statute Criminalizes A Vast Amount Of Real Estate Advertising That Otherwise Is Entirely Ethical.

The State contends its Anti-solicitation law combats "unethical real estate practices such as blockbusting and

panic peddling" by "unethical realtors (sic)[2]." (Opp. Br. at 4, 10.) Any implication that Petitioners engaged in "unethical practices," however, is completely unwarranted. Petitioner Pearson's peers have recognized him as an industry leader in equal opportunity matters. (*See* Pet. at 3.) Petitioners were not charged with violating any of the state or federal laws that directly prohibit blockbusting and similar activities. *See* 42 U.S.C. §3604; *Ill. Rev. Stat.* ch. 38, ¶70-51(a-c). The advertising technique that triggered Petitioners' prosecutions—telephone calls advertising their services—is employed untold millions of times each day by thousands of businesses in myriad industries. The sole reason the State sought to imprison these Petitioners is that they were black brokers seeking business in a predominantly white community. Hence the facts of this case conclusively prove the Statute sweeps far more broadly than would be necessary to combat "unethical" practices. (These facts, however, are among those that the courts below refused to consider. (*See* Pet. 8-10, 18-19.))

Indeed, the State conceded below that no reasonable fit exists between its interest in preventing unethical real estate practices and the Anti-solicitation law. Unlike other paragraphs of the same statute which directly prohibit blockbusting and similar discriminatory conduct (*Ill. Rev. Stat.* ch. 38, ¶70-51(a-c)), the Anti-solicitation law "does not limit [its scope] to solicitations made on a discriminatory basis." Therefore, the State argued by "implication," the legislature must have had a different purpose in mind: *i.e.*, privacy. (Brief of Defendants-Appellees, App. No. 89-3248, pp. 37-38.) Perceiving the futility of that argument, of course, the State now acknowledges that privacy became a "purpose" of the Statute only "in recent times."

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[2] The term "Realtor®" is a registered trademark of the National Association of Realtors®.

(Opp. Br. at 10.) The State's concomitant revival of the Statute's purported anti-discrimination purpose is notable principally for its implicit acknowledgement that privacy also fails to sustain the Statute.

B. The State's Illusory Comparison To *Rowan v. Post Office Dept.* Would Permit Government To Silence Any Disfavored Group.

The State's glib assertion that an interest in protecting residential privacy justifies the Anti-solicitation law (Opp. Br. at 7-8) illustrates the danger created by the lower courts' unquestioning acceptance of this assertion. The State never explains how advertising distributed at a shopping mall, for example, might disturb residential privacy, or why a phone call from a real estate broker invades a resident's privacy but a call from a long distance telephone carrier, for example, does not do so. If the lower courts' failure to require such explanations were not error, then a purported "privacy interest" would become a universal justification for governmental restrictions on commercial speech. "Privacy" also would camouflage any insufficient purpose that actually motivated the restriction, as the State's desire to influence racial forces in the real estate market concededly did in this case. Hence, while protection of residential privacy unquestionably is a substantial interest in the abstract, its uncritical acceptance in this case creates a dangerously expansive precedent that this Court should reverse.

This Court's decisions (including those relied on by the State) reflect the careful analysis needed to harmonize legitimate governmental concern for privacy with First Amendment protections. Thus, rather than provide "strong support" for the State's position (Opp. Br. at 8), *Frisby v. Schultz*, 487 U.S. 474 (1988), instead highlights a glaring

flaw in the Court of Appeals' privacy rationale: a restriction on generally directed written or telephone communications provides only remote and ineffective protection of residential privacy. This Court distinguished the focused picketing at issue in *Frisby* as "fundamentally different from more generally directed means of communication," including solicitation and handbilling. 487 U.S. at 486. The Court identified two fundamental differences: (1) solicitation communicates information to the public, not to specific households; and (2) unlike solicitation, picketing "inherently and offensively intrudes on residential privacy." *Id. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (a regulation that provides only remote and ineffective protection does not directly advance the state interest involved, and thus may not be sustained).

Other decisions by this Court also recognize the minimal intrusion created by communications—such as mailings and phone calls—that residents readily may disregard. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) ("[a]lthough some sensitive souls may have found appellant's [written] advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (a mailing does not hold residents "captive" in their homes because they are free to avert their eyes and throw away the mailing); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (same); *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475-76 (1988) (extending *Zauderer* to targeted mailings in part because neither targeted nor generally directed mailings invade the recipient's privacy). Despite these precedents, the State points to no characteristic of real estate advertising that warrants singling out such speech for special restriction.

The courts below excused this deficiency in the State's rationale by an unprecedented extension of *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). Although the content-neutrality of the statute at issue in *Rowan* was central to the Court's decision to uphold the statute, 397 U.S. at 735-737 & N.4, the courts below extended *Rowan* to uphold discrimination among speakers based on viewpoint. This Court has warned, however, that "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition even-handedly . . . ." *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Rather than demonstrating an even-handed commitment to privacy, the State cites the "unreceptive addressee" to justify its discriminatory treatment of real estate brokers' speech. (Opp. Br. at 11-12.) As noted in our Petition, this justification is illusory because the mere requirement that residents must opt into the State's discriminatory scheme does not make the scheme less discriminatory. (Pet. at 17-18.) In addition, residents who opt into the State's discriminatory scheme may in fact be willing to receive some of the advertising the State prohibits. The notice to brokers required by the Statute says the resident "does not desire to sell [his or her] property." *Ill. Rev. Stat.* ch. 38, ¶70-51(d). A resident who does not wish to sell nevertheless may wish to learn of available homes nearby. With this information, the resident can, in the words of Petitioners' own advertising, "pick [his] neighbor" by informing friends and relatives. (*E.g.*, R-80, Ex. 1J.) Advertising that provides such information not only is entirely "ethical," but it builds stronger communities as well. The Statute, however, fails to warn residents that the State will silence such advertising together with solicitations to sell, so the law's vagueness undermines the very notion

that it protects "unwilling listeners." (This is another fact the lower courts refused to consider.)

Finally, the courts below also refused to consider uncontroverted evidence that the Anti-solicitation law prevents brokers from reaching many residents who resist requests by community groups and elected officials to sign Anti-solicitation notices. The Statute's unclear scope and draconian penalties drive brokers from some communities altogether. (*E.g.*, R-80, Ex. 1, ¶¶17-19, Ex. 4, ¶6.) In addition, a few participants in the Anti-solicitation scheme may effectively render an entire mass or bulk mail zone beyond the reach of brokers by these highly effective media. (*E.g.*, *Id.* at Ex. 4, ¶12.)

C. Significant Differences Distinguish Illinois' Anti-Solicitation Statute From The Ordinances At Issue In The *South Suburban Housing Center Case.*

The State's effort to treat this case "collectively" with *South Suburban Housing Center v. Greater South Suburban Board of Realtors®, et al.*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 971 (1992) ("*South Suburban*"), obscures important differences between the Statute at issue here and the municipal ordinances at issue in *South Suburban*. The Court of Appeals described these differences as follows:

> One difference between the ordinances of the four municipalities and the state statute is that the municipal ordinances call for the city or village not only to compile but also to publish the non-solicitation list. The other differences are that the municipal ordinances are more limited in that they specifically define "solicit or solicitation," restrict their application to types of contacts that occur in the home or a residence and provide for fines only.

South Suburban, 935 F.2d at 876.

Each of these differences is important. The Statute's failure to require publication of notices permits selective enforcement of the Statute against brokers, like Petitioners in this case, who provoke the ire of a community group by seeking housing for black customers in a predominantly white neighborhood. The Statute's failure to define "solicit or solicitation" obviously exacerbates its vagueness. The Statute's application to speech that occurs anywhere in Illinois enfeebles the State's reliance on an interest in residential privacy. Finally, the Statute's severe criminal penalties increase the unfairness created by its vagueness.

III.

THE COURTS BELOW NEVER REQUIRED THE STATE TO MEET ITS CONSTITUTIONAL BURDEN IN THIS CASE.

The State bears the burden to justify its restriction on Petitioners' protected speech. *E.g.*, *Zauderer*, 471 U.S. at 641. As the State's Opposition Brief acknowledges, the Courts below never held the State to this burden. (Opp. Br. at 13.) To the contrary, the lower courts' first review of Petitioners' challenge occurred on Petitioners' motion for preliminary injunction; Petitioners then bore the heavy burden imposed by *Brunswick Corp. v. Jones*, 784 F.2d 271, 273-74 (7th Cir. 1986). *Curtis*, 840 F.2d at 1296. (Tellingly, the District Court simultaneously *denied* the State's motion to dismiss Petitioners' action for failure to state a claim. (App. at 48-49.)) On remand following denial of Petitioners' motion for preliminary injunction, the lower courts imposed on Petitioners the "burden to prove that *Curtis* should not be the law of the case." (Opp. Br. at 13.) *Contra*, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Hence the State never faced its constitutional burden to justify the restrictions imposed on Petitioners' speech. Particularly when coupled with the lower courts' refusal to consider the facts of the case (Pet., pp. 18-19), the peculiar procedure below inflicted on Petitioners an injury of constitutional significance. Although Petitioners believe the substantive issues raised by the decision below warrant reversal on the merits, Petitioners respectfully suggest a remand for consideration of the factual record in light of the correct legal standards and constitutional burden is the minimum alternative action needed to restore fairness to Illinois' treatment of Petitioners and other real estate professionals.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals should be granted.

Respectfully submitted,

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